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# THE PUNISHMENT SYSTEM
# (*NIDHAM UL-'UQOOBAAT*)

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Bismillah ir-Rahmaan ir-Raheem

"*Verily there is life for you in retaliation (qisas), O men of understanding, so that you may take precaution*"
[TMQ Al-Baqarah:179]

Allah *Al-Adheem* spoke the truth

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*Bismillah Ir-Rahmaan Ir-Raheem*

**THE PUNISHMENT SYSTEM**

**PUNISHMENT**

Punishments were legislated to deter (*zajara*) people from offending (*jaraim*). Allah *Ta'ala* said, "*Verily there is life for you in retaliation, O men of understanding*" [TMQ Al-Baqarah:179], ie in legislating retaliation for you, which is killing the killer, there is great wisdom, that is the survival and preservation of life. This is because if the killer knew that he would be killed, he would desist from his work, thus protecting the life of the souls. Moreover, if the sane person knew that if he killed he himself would be killed, he would not venture into killing. This is the case for all deterrents. The meaning of it being a deterrent is that it restrains people.

The offence is the repugnant/ugly *action*), and the *repugnant* is that which the *Shar'* made repugnant. Therefore the action is not considered an offence unless the *Shar'* stipulates that it is a *repugnant* action. At that point, it is considered an offence, irrespective of the level of its repulsiveness ie irrespective of the offence being great or small. The *Shar'* ordained the *qabeeh* action as a sin over which there is punishment, thus the sin is the offence itself.

The offence does not exist in the innate nature of man, nor is it a*cquired,* ) just as it is not an illness man is afflicted with. It is rather a violation ) of the system that organises man's actions, in his relationship with his Lord and with himself, and the relationships of people with each other. That is because man was created by Allah *Ta'ala,* where He created in him instincts and organic needs; and these instincts and organic needs are vital energies in man that drive him to strive to satisfy them. So he undertakes the actions that emanate from him for the sake of satisfaction. Leaving this satisfaction without a system leads to chaos and confusion, resulting in erroneous or abnormal satisfaction. Allah has organised the satisfaction of these instincts and organic needs when He organised man's actions by the *Shar'iyyah* rules, so the Islamic *Shar'* explained the rule in every incident occurring to man, and legislated *halal* and *haram*. Accordingly the *Shar'* came with its orders and prohibitions,

commanded man to act according to what it ordered and abstain from what it prohibited. If he violates that, then he has performed the *qabeeh* ie performed an offence. So a punishment is necessary for this offence, so that man abides by what Allah ordered him with and abstains from what He prohibited him ; or else there is no meaning to these orders and prohibitions, if there is no punishment for violating them. The Islamic *Shar'* explained that there are punishments for these offences in the Hereafter and punishments in the world. As for the punishment of the Hereafter, Allah *Ta'ala* is the One who punishes the offender with them, and He punishes him on the Day of Judgement. Allah *Ta'ala* said, "*Criminals will be known by their marks, and they will be seized by the forelocks and feet*" [TMQ Ar-Rahman:41], and He *Ta'ala* said, " *But for those who disbelieve, for them is the Fire of Hell*" [TMQ Fatir:36]. And He (SWT), said, " *And for those who hoard up gold and silver, not spending it in the way of Allah, announce to them a painful torment. On the Day when it (money, gold/silver) will be heated in the Hellfire and their foreheads, flanks and backs will be branded with it, 'This is what you hoarded for yourselves, so taste that which you used to hoard*" [TMQ At-Tauba:34-5]. And He (SWT), said, "*And for those who transgress, will be an evil final Return, Hell; where they will burn, and worst indeed is that place to rest!*" [TMQ Sad:55-6]. Even though Allah threatened sinners with punishment, however the matter of sinners is entrusted with Him *Ta'ala*; if He wills, He will punish them and if He wills, He will forgive them. He *Ta'ala* said, " *Verily, Allah forgives not that partners should be set up with him in worship, but he forgives (anything) except that to whom he pleases*" [TMQ An-Nisa':48]. Their repentance is accepted due to the generality of the evidences.

As for the punishment of the world, the Imam or his deputy undertakes it ie the State performs it by establishing the *hudud* of Allah and executing the rules of *crimes, ta'zeer (discretionary punishments)*, and executing the *codes pertaining to violations and infringements*. These punishments in the world for the sinner (for a sin he perpetrated) removes from the sinner the punishment of the Hereafter; hence the punishments are restraints and )

eliminators/compensators. As for them being restraints, this is because they restrain people from doing sins and perpetrating offences. As for them being compensators, this is because they ) eliminate the punishment of the Hereafter. So the punishment of the Hereafter is eliminated by the State's punishment in the world. The evidence for that is what Al-Bukhari narrated from 'Ubadah bin As-Samit (ra) who said, "**We were with the Prophet (saw) in an assembly and he said, 'Give me the bay'ah on condition that you do not associate anything with Allah, you do not steal and do not commit *zina*', and he read all of this *ayah* (the *ayah* on the *bay'ah* of women). 'So whoever fulfils among you, his reward is with Allah, and whoever does anything of that and is punished for it, then it is expiation (*kaffara*) for him. And whoever does anything of that and Allah conceals him upon it, if He wills He will forgive him and if He wills, He will punish him**.'" This *hadith* is explicit that the worldly punishment of the sinner, eliminates from him the punishment of the Hereafter. It is because of this that 'Ma'iz' confessed to *zina,* so he was stoned until he died, and Al-Ghamidiyyah confessed to *zina,* so she was stoned until she died, and a woman from Juhaina confessed to *zina* so she was stoned until she died. The Messenger of Allah (saw) said about her, "**She has repented a repentance were it to be divided between seventy of the people of Madinah, it would be enough for them**." These persons confessed so that they were punished for the sin by the State in order for the punishment of the Hereafter to be eliminated from them. Thus you find Al-Ghamidiyyah saying to the Messenger, "**O Messenger of Allah, purify me**." Many Muslims would come to the Messenger of Allah and confess to offences they perpetrated, so that the Messenger inflicts upon them the *hadd* in the world in order for the punishment of the Day of Judgement to be eliminated from them. Thus, they bore the pain of the *hadd* and retaliation in the world because it is easier than the punishment of the Hereafter. Accordingly, the punishments are eliminators/compensators. (Pages 1-9, 2 hours)

These punishments from the State for the sins and offences are the sole method to execute the orders of Allah and His prohibitions. Allah legislated rules, and legislated other rules to execute them, which are the rules of punishment. So He ordered to preserve property, he (saw) said, "**The property of a Muslim man is not allowed except if he agrees to give it willingly**", and he said, "**Verily your blood and properties are *haram* for you**". He (SWT) legislated rules to cut the hand to execute the order of Allah, and He prohibited *zina*. He *Ta'ala* said, " ***And come not near to zina***" [TMQ Al-Isra':32], and He SWT legislated the rules of flogging (*jald*) and stoning to execute this prohibition of Allah. Thus, regarding all orders and prohibitions, He ordained the method of executing them, which is the punishment by the State for the failure of abiding by these rules. Therefore, the method to execute the rules of *Shar'a* is the punishment of the one who does not abide by them ie punishment upon the one who violates them, by specified punishments He determined, or by appointing the ruler to assess their punishment.

**THE ACTIONS OVER WHICH PUNISHMENTS OCCUR**

The actions over which punishment occurs are neglecting the *fard,* and perpetrating the *haram*, and violating what the State issues of decisive orders and prohibitions; other than these three, there is no punishment for any action. That is because the *Shar'iyyah* rules related to the actions of man are five; they are the *fard*, which is the *wajib* (obligatory), the *mandoub*, which is the *Sunnah* and *nafila* (recommended), the *mubah* (permissible), the *haram*, which is the forbiddance (*hadhr*) and the makrooh (disliked). The *fard* is requesting (doing) the action decisively, the *mandoub* is requesting (doing) the action indecisively, the *mubah* is giving a choice between doing and leaving, the *haram* is requesting leaving (the action) decisively, and the *makruh* is requesting leaving (the action) indecisively. Allah (SWT) only punishes upon violating the decisive request of the action and

upon violating the decisive request to leave (the action) ie for violating the decisive order and decisive prohibition. He does not punish for other than that. The one who leaves the *Sunnah* has no punishment upon him, and the performer of the *makrooh* has no punishment over him; and (as for) the one given a choice between doing and leaving an action, it is conspicuously clear like the sun that there is no punishment for him if he did (the action), and no punishment if he left (the action) since he is given a choice to do or leave. When Allah *Ta'ala* threatened over the violation of His orders and prohibitions, He only threatened the disobedient, so He (swt) said, " … and whosoever disobeys Allah and His Messenger, then verily for him is the Fire of Hell, he shall dwell therein forever " [TMQ Al-Jinn: 23] and He said, "And Whosoever disobeys Allah and His Messenger, and transgresses His limits, He will cast him into the Fire, to abide therein; and he shall have a disgraceful torment" [TMQ An-Nisa':14]. So the threat is only for the disobedient. The one who neglects the *mandoub* or does the *makruh, he is* not of the disobedient because the request about them was not decisive, whether the request to do or the request to leave. As long as they are not disobedient, they are not punished over their action, which is leaving the *mandoub* and doing the *makruh,* and leaving the *mubah* or doing it ie Allah will not punish them over their actions. As long as Allah does not punish, how will it be permitted for the State to punish them? The State inflicting of the punishments decreed by the Legislator is an indispensable matter, which are all punishments for doing the *haram* or neglecting the *fard*, and also the State inflicting of punishments that are estimated by the *ta'zeer. Ta'zeer (discretionary punishments)* is an undetermined punishment for a sin that has no *hadd* or expiation therein. So it is restricted to the sins. Thus the *mandoub*, *makruh* and *mubah* do not enter it, as they are not sins. As for the *violations*, they are sins, because the Messenger says, "**Whoever disobeys the *Amir*, verily he has disobeyed me**". So it is a punishment upon a sin. Therefore, there does not exist punishment except for sins; and what is not a sin has no punishment over it. Hence (there is) no punishment upon neglecting the *mandoub* actions nor upon doing a *makruh* action, nor upon

neglecting the *mubah* or doing it even if the *Amir Ul-Mu'mineen* commanded it. His ordering it does not make performing it *fard* and leaving it *haram*. Rather his order of it is adoption of a *Shar'ee* opinion from various opinions in its regard. Compelling the people with it, and leaving other than it (of opinions) is a command of the *Shar'* not a command from himself. So the matter remains the command of Allah and the rule remains as it were, *mandoub* or *mubah* or *makruh*, as it came in the *Shar'* came with it. Based upon this, the actions over which punishment occurs are restricted to two actions, namely ignoring the obligatory (*furudh*), and doing the forbidden (*muharramat*).
(3 pages, 2 hours)

**TYPES OF PUNISHMENT**

Punishments are of four types namely: *hudud (limits)*, *jinaayaat (crimes)*, *ta'zeer (discretionary)* and *mukhaalafaat (violation)*. As for the *hudud*, they mean the punishments for the sins that are determined ) because of the right (*haqq*) of Allah. They are called *hudud*, because they generally prevent the sinner from returning to the sin for which he was punished with the *hadd.* The *hadd* is also designated for the sin itself. The example of that is His (SWT) saying , "*These are the limits set by Allah, so do not approach them*" [TMQ Al-Baqarah:187] just as it is designated for the punishment of that sin. The words '*hadd*' and '*hudud*', by the meaning of punishments of the sins, are not designated except upon the sins wherein there is the right of Allah Ta'ala. It is not designated for other than these. Pardoning the punishment is not allowed in them, neither from the ruler nor from the one aggressed against. This is because it is the right of Allah. So nobody is allowed to waive it by any means.

As for *jinaayaat (crimes)*, they are designated for assault against the body, that obliges retaliation or property. Thus they include assault upon the life, and assault upon the body's organs. What is meant of them here are the punishments that are inflicted upon this assault. These punishments have the right of the human therein. Since they are related to the human's right, it is permitted for the owner of the

right to forgive and waive his right. Allah *Ta'ala* said, **"** *But if the relatives of the killed person forgive their brother…*" [TMQ Al-Baqarah:178] after His saying, "*Retaliation is prescribed for you in the case of murder; The free for the free, the slave for the slave and the female for the female*" [TMQ Al-Baqarah:178], ie whoever is pardoned by his brother in the *deen* by those in charge of the blood of something of their rights in retaliation. This indicates the permissibility of the owner of the right in *jinaayaat* to waive his right. There came many *ahadith* that explain the permissibility of the owner of the right to pardoning. From Abu Shuraih Al-Khuza'iyy who said, I heard the Messenger of Allah (saw) saying, "**Whoever is afflicted by blood or *khabal* (and the *khabal* is the wound) has a choice of one from among three; either he retaliates or he takes the blood money (*'aql*) or he pardons. If he wants a fourth, prevent him**." It is narrated from Abu Hurayrah from the Prophet (saw) who said, "**No man pardons an unjust act except Allah increases him in honour thereby**." It is narrated from Anas who said, "**There was never raised a matter wherein there was retaliation to the Messenger of Allah (saw) except that he commanded pardon therein**."

All these evidences indicate the permissibility of pardon. As long as there is no right of Allah *Ta'ala*, the pardon of the owner of the right obliges the ruler's pardon, so the ruler completely pardons the aggressor once there was pardon from the owner of the right. It is not right to say there is a right for all citizens, which is security in these crimes, because the existence of a right in them for all Muslims requires an evidence to prove it, and there is no evidence for that. It is also because what was acted upon at the time of the *Sahabah* (ra) is that when the owner of the right pardoned the aggressor, the punishment was waived from him. At-Tabarani extracted, 'That a man of the Muslims who killed a man of the *Ahl Adh-Dhimmah* was brought to Ali (ra) and the evidence was proved against him, so he commanded his killing. His brother came and said, 'I have pardoned.' He said, 'Perhaps they threatened you and terrified you and censured you?' He said, 'No, but killing him will not return my brother to me and they offered me and I accepted'. He said, 'you know better. Whoever

has our *dhimmah*, his blood is like our blood and his *diyyah* is like our *diyyah*'. This indicates that the pardon of the aggressor from the owner of the right waives the punishment from him.

As for *ta'zeer*, it is the punishment for sins that have no *hadd* or expiation (*kaffara*). When the sin is perpetrated, it is examined. If it were of that which Allah decreed specific punishment ie it entered under the *hudud*, its perpetrator is punished by the *hadd* that Allah legislated and not by the *ta'zeer*. Similarly if He ordained a specific expiation for it, its perpetrator is compelled upon the expiation. However, if it did not enter under the *hudud* and the *Shar'* did not ordain an expiation for it, it enters under the punishment of *ta'zeer*. As for the assault upon the body, there is no *ta'zeer* in it because the *Shar'* explained its punishment.

The *ta'zeer* differs from the *hudud* and *jinaayaat* since the *hadd* and *jinaayaat* are specific decreed punishments from the Legislator (*Ash-Shari'*). They are compulsory, and it is not permitted to change them, nor increase or decrease in them. As for the *ta'zeer*, it is a punishment that is not decreed by itself, not compulsory by itself. Moreover, the *hudood* and *jinaayaat* do not accept pardon in them, nor abolition from the ruler, except pardon from the owner of the right in the *jinaayaat.* This is contrary to the *ta'zeer* for it accepts pardon and abolition. The Messenger (saw) did not punish by *ta'zeer* the one who said to him, "Verily the sake of Allah is not sought by this distribution", and he pardoned him even though this speaker perpetrated a sin that deserves punishment. Furthermore the *hudood* and *jinaayaat* do not vary with the differences of people so all people are equal regarding them, due to the generality of the evidences. This is contrary to *ta'zeer*, which is allowed to vary according to the people; where the lack of precedence is considered in it, and also the people of good behaviour and the like. It came from Aisha (ra) that the Prophet (saw) said, " **Exempt the stumbles (*'atharat*) of the people of rank except the *hudood***." The meaning of their 'atharat in this context is their violation the orders of Allah and His prohibitions, by the evidence of his saying "**except the *hudood***" which is a conjunction (*qareena*) for the intended meaning. It is also narrated from Anas bin Malik that the

Messenger of Allah (saw) said, "**The Ansar are my belly (*kirsh*) and my leather bag (*'aiba*). People will increase and they will decrease. So accept from their welldoers (*muhsin*) and tolerate *(tajawazoo)* their offenders** ." The meaning of tolerance ( *tajawuz*) is pardon, and the offender includes the perpetrator of sin because he is an offender. All of this indicates that it is valid that the amount of ta'zeer punishment differs according to the situations and circumstances of the people; so a person is punished for a sin by imprisonment and another is punished for the same sin by reproach or censure and blame.

As for the *mukhaalafaat (violations)*, they are the punishments inflicted by the ruler upon the one who violated the commands of the ruler (*sultan*), whether he was the *Khaleefah* or other than him of the assistants, governors (*wulat*) and of cities (*'umal*) and their like, whose function is ruling and has the competence in issuing orders. This punishment for violating the command is the punishment of *t mukhaalafah*. Similarly *mukhaalafah* is designated for the action itself in which he violates the ruler's command, so it is designated upon the action and upon the action's punishment. The *mukhaalafah* was ordained as a punishment among the punishments commanded by the Legislator because violating the ruler's command is a sin since Allah has commanded the obedience of those in authority (*ulu al-amr*) by the Qur'an explicitly. He *Ta'ala* said, "*Obey Allah and obey the Messenger and those of you who are in authority*"**,** [TMQ An-Nisa:59] and He commanded the obedience of the *Amir* explicitly. From Umm Al-Husayn Al-Ahmasiyya that she heard the Prophet (saw) saying, "**Hear and obey even if an Ethiopian slave is appointed over you as long as he establishes the Book of Allah (swt) over you**." It is reported from Anas who said, The Messenger of Allah (saw) said, "**Hear and obey even if an Ethiopian slave was appointed over you with his head like a raisin**." This is an evidence for the obligation of obedience to the *Amir*, whether a *wali* or *'aamil*. It is narrated from Abu Salamah bin Abdurrahman that he heard Abu Hurayrah (ra) say that the Messenger of Allah (saw) said, "**Whoever obeyed me, verily he obeyed Allah, and whoever disobeyed me, verily he has disobeyed Allah. Whoever obeyed my *Amir*, verily he obeyed me and whoever**

**disobeyed my *Amir*, verily he disobeyed me**." This is explicit that conflicting with the ruler is a sin, hence there is a punishment over it. Since the Legislator did not determine for it a specific punishment then the judge can *assess* a punishment over it, and the ruler can assess the punishment he deems fit for this sin. Thus some *fuqaha* add the *mukhaalafaat* to the category of *ta'zeer* since they are punishments over a sin that the Legislator did not determine., However, the truth is that it is not of the category of *ta'zeer* since it is not violating the command of Allah, while *ta'zeer* is specific to violating the orders and prohibitions of Allah(swt), but these are not like this. However, since they are violating the command of Allah of obedience to the ruler,

it became a specific punishment assessed by the ruler according to what the violation of his commands and prohibitions deserve of punishment. Therefore the *mukhaalafaat* are specific to violating the commands that the ruler issues from himself, due to the function given to him by the *Shar'*.

It should be known that the commands issued by the ruler from himself, whether they were of the type of commandments or prohibitions, are confined to what the *Shar'* ordained to him according to his opinion and ijtihad. The example of that is the management of *Bait al-Mal*, establishing cities, organising the armies etc. These matters, which the *Shar'* ordained for him to undertake according to his opinion and ijtihad, are the matters for which he can command and prohibit things. Violation of these commands is considered a sin according to the *hadith*, "**Whoever disobeys the *Amir*, verily he has disobeyed me**." This is what enters under the *mukhaalafaat*; other than these are not considered *mukhaalafaat,* even if the *Amir Al-Mu'mineen* were to command them. That is because the *Khaleefah* does not allow something *haram* or forbid something *halal*, so it is not allowed for him to oblige (make *fard*) the *mandoub* or *mubah* nor forbid (make *haram*) the *makruh*. If he does that, his obedience is not obligatory nor is the violation of his commands a sin. So if he compelled the people with a *mubah* or *mandoub*, then he would have obliged it upon them; and if he prevented people from the *makruh*,

then he would have forbidden it upon them. Likewise it is not permitted for him to allow the *haram* or make the *haram mubah* because he would have made the *halal haram* and made the *haram halal.* There is explicit prohibition in the Qur'an of this, which came general (*'aamm*) including the *Khaleefah* and others. It is only for the *Khaleefah* to command and prohibit in what the *Shar'* ordained for him to undertake according to his opinion and ijtihad. Hence the *mukhaalafaat* are confined to one type, namely the matters that are allowed for the ruler to manage by his opinion and ijtihad.

These are the types of punishments and there is nothing more whatsoever. All that emanates from people of actions for which punishment is deserved enter under these four types,because they are either sins for which the *Shar'* determined a punishment, or sins for which the *Shar'* has not determined a punishment, or an assault upon the body; these are three actions. The fourth action is disobeying the ruler. So these are the four types and their details come in four chapters.

## CHAPTER 1
## *AL-HUDUD*

The origin of the *hadd* is that which separates between two things, preventing their mixing. The *hadd* of the house is that which distinguishes it, and the *hadd* of something is its distinguishing mark (*wasf*) that surrounds it, and distinguishes it from other things. The punishment of *zina* and its like is called *hudud,* because they are determined by the *Shar'*. The *hudud* could be called to mean the sin themselves, like in His saying *Ta'ala*, "*These are the hudud of Allah so do not approach them*" [TMQ Al-Baqarah**:**178]. They are also described as the revealed laws of Allah and His prohibitions like His

saying *Ta'ala***,** "And those are the set limits of Allah. And whosoever transgresses the set limits of Allah, then indeed he has wronged himself.**"** [TMQ At-Talaq:1] The *hudud* in technical terminology is the punishment determined by the *Shar'* for a sin to prevent falling into the sin. The sins over which it is agreed that their punishments are the *hudud* ie obliging the *hadd* in them are six namely; *zina* and homosexuality (*liwat*), *qadhf* (accusation of fornication), drinking alcohol, stealing, apostasy and *hiraba* ie fighting the rebels. There are warnings regarding all of these *hudud*. There came a warning of *zina* in the Qur'an and *hadith*. He *Ta'ala* said, **"*Do not come near to zina. Verily it is an indecency (fahisha) and an evil way*"** [TMQ Al-Isra':32]. It is also narrated from Abu Hurayrah that the Messenger of Allah (saw) said, "**An adulterer (*zani*) does not commit *zina* when he commits *zina* while he is a believer (mu'min), nor drink alcohol when he drinks alcohol while he is a believer, nor steal when he steals while he is a believer, nor rob a booty over which people raise their eyes to him while he is a believer**."

Warning came regarding homosexuality (*liwat*) in the Qur'an and *Hadith*. As for the Qur'an, verily Allah has called homosexuality therein indecency (*fahisha*). He said, "*And Lut when he said to his people, 'Do you commit the worst sin such as none preceding you has committed in the 'Alamin (jinn and mankind)? Verily you practice your lust on men rather than women. Nay, but you are a people transgressing beyond bounds*" [TMQ Al-A'raf:80-1]. Allah also demonstrated the punishment of the people of Lut, where He punished them with sinking into the ground (*khasf*). He *Ta'ala* said, **"*Where Our command came, We turned them upside down and rained on them stones of baked clay piled up*"** [TMQ Hud:82]. Allah narrated that to us so that we take heed. As for the *hadith*, Muhammad bin Ishaq narrated from Amru bin Amru from the Prophet (saw) that he said, "**Cursed is he who performs the action of the people of Lut**." It is narrated from ibn Abbas who said, The Messenger of Allah (saw) said, "**Whoever you find doing the action of the people of Lut, kill the doer and the one to whom it is done**." Warning against *qadhf* (slandering chaste believing women with *zina*) came in the Qur'an and *Hadith*. He *Ta'ala* said,

**"*Verily those who accuse chaste and believing women, are cursed in this world and the Hereafter, and for them is a painful punishment*"** [TMQ An-Nur:23]. It is narrated from Abu Hurayrah that the Messenger of Allah (saw) said, "'**Avoid the seven mortal sins (*mubiqat*).' It was said, 'What are they, O Messenger of Allah?' He (saw) replied, 'Association of partners with Allah, magic, killing the soul that Allah made inviolate except by justice, eating *riba*, eating the orphan's property, fleeing on the day of battle and slandering chaste women**.'" Warning also came about alcohol in the Qur'an and *Hadith*. Allah *Ta'ala* said, ***"O you who believe, verily alcohol, gambling, statues and divining arrows are filth of Satan's work. Avoid them in order that you may succeed. Verily Satan only wants to bring about enmity and hatred among you in alcohol and gambling, and to hinder you from the remembrance of Allah and prayer. Will you then abstain?"*** [TMQ Al-Ma'idah:90-1]. The Qur'an has emphasised in this *ayah* the forbiddance of alcohol and gambling with different types of emphasis—among them is prefacing the sentence with '*Innama*', and that He linked it with the worship of idols, and making it filth (*rijs*), just like He said, **"*Avoid the filth (rijs) of idols*"** [TMQ Al-Hajj:30], and that He made it of Satan's work and nothing comes from him except pure evil. Of them is that He commanded of avoidance and making the avoidance (as being) of success, which is a conjunction (*qareena*) that the command of avoidance is a decisive command; and that He mentioned what will result therefrom of harm) which is the occurrence of mutual enmity and hatred from the people of alcohol and gambling, and what they lead to of turning away from the remembrance of Allah and from observing the times of prayer. It concluded all that by decisive prohibition using the from of negative interrogative by His saying, "*Will you then abstain?*", ie avoid it. This is of the most eloquent ways of forbiddance, as if it was said, It has been recited to you what there is in the two matters aversions and hindrances) so will you, in relation to these aversions and hindrances, abstain? It has also been reported from ibn Abbas who said, "**The Messenger of Allah (saw) had a friend from Thaqif and Daws, and he met him on the Day of Conquest (of Makkah) with a female riding**

**camel or a watering camel carrying khamr (rawiya) from Hijr, donating it to him. He said, O so and so, do you not know that Allah forbade it? So the man turned to his slave and said, Go and sell it. The Messenger of Allah (saw) said, Verily the One who forbade drinking it forbade selling it. Then he ordered him to empty it on the ground**." A warning came about stealing in the Qur'an and *Hadith*. Allah *Ta'ala* said, "**O Prophet, when the believing women come to you giving you the bay'ah on condition that they do not associate anything with Allah and do not steal**" [TMQ Al-Mumtahinah:12]. Giving the Messenger the *bay'ah* on condition they do not steal is explicit in forbidding stealing. It is narrated from Abu Hurayrah who said, The Messenger of Allah (saw) said, "**Allah cursed the thief who steals a helmet (*baydha*) so his hand is cut, and steals a rope so his hand is cut**". The meaning of '*baydha*' here is the iron helmet. Another warning came about apostasy in the Qur'an and *Hadith*. Allah *Ta'ala* said, **"*Whoever apostatises from his deen and dies while he is a kafir, those are the ones whose deeds have perished in the world and Hereafter. And they are the inhabitants of the Fire (dwelling) therein forever*"** [TMQ Al-Baqarah:217]. It came in the *hadith* of Mu'adh "**that when the Prophet (saw) sent him to Yemen, he said to him, 'Whichever man apostatises from Islam, invite him (back). Either he returns or strike his neck. And whichever woman apostatises from Islam, invite her (back). Either she returns or strike her neck**.'" A warning came about highway robbery in the Qur'an and *Hadith*. Allah *Ta'ala* said, **"*Verily the recompense for those who wage war against Allah and His Messenger and spread evil in the land is that they are killed or crucified or their hands and feet be cut on opposite sides or that they be exiled*"** [TMQ Al-Ma'idah:33].It is narrated from Anas, "**that the people from 'Ikl or 'Uraynah came to the Prophet (saw) and accepted Islam. Madinah was unhealthy for them so the Prophet (saw) commanded for them some camels and a shepherd , and he ordered them to go out and drink from their urine and milk. They departed until when they were in the region of Al-Harr, they reneged their Islam and killed the shepherd of the Prophet (saw) and drove away the camels. That reached the Prophet (saw) got the news of**

**that, so he sent some people to chase them. Then he commanded with nails that were heated, and he branded them, cut their hands and feet without terminating them. Then they were thrown in Al-Harra, and they asked for water but were not given water until they died**." A warning came about rebellion and raising the sword in the face of the *Khaleefah*. He *Ta'ala* said, "*If two parties of the believer fight, make peace between them but if one transgressed against the other then fight the one that transgresses until it returns to the command of Allah*" [TMQ Al-Hujurat:9]. It is narrated from *Amir Al-Mu'mineen* Ali bin Abu Talib (ra) who said, I heard the Messenger of Allah (saw) say, "**There will come forth a people at the end of time young in age, stupid in understanding, saying the saying of the best of creation. Their *iman* will not exceed their throats, and they will renege from the *deen* like an arrow passes through a game animal. Whoever of you meets them, fight them for in killing them is a reward for the one who kills them until the Day of Judgement**." It is narrated from the Prophet (saw) who said, "**Whoever bears weapons against us is not of us**." These evidences of the Book and *Sunnah* show that there came warning concerning all the *hudud* so perpetrating any one of them is a sin. Since the lawgiver determined the hudood for this aim, ie specific punishments, then it is obligatory to abide by the hudood.

The *hadd* is not obliged except upon the mature sane person, bound by the rules of Muslims, Muslim or *dhimmi*. The man is struck standing with an average whip, not new or old. The one given the *hadd* is neither stretched out nor stripped of his clothes during his lashing, due to the saying of ibn Masoud, 'In our *deen* there is no stretching out, chaining or stripping bare.' He is not exaggerated in lashing, such that the lashing tears the skin, because the objective is to restrain him and not destroy him, nor does the lasher raise his arm such that his armpit appears. It is recommended to spread/distribute the strikes on his body and it is obligatory to protect/avoid the head, face, private parts and what kills, like the heart and two) testicles, because striking something of these could lead to killing him or to him losing their benefit. The woman is treated like the man in what was mentioned,

except that she is struck while sitting. Ali (ra) has said, 'The woman is struck while sitting and the man while standing.' The most severe lashing is the lashing of *zina,* then the lashing of *qadhf,* then the lashing of drinking, then the lashing of *ta'zeer.* This is because Allah specified *zina* with extra emphasis by His saying, "*Let not pity for the two seize you in the deen of Allah*" [TMQ An-Nur:2]. What is below that is lighter than it in number, so it is not permitted that it exceeds it in description.

**THE *HADD* OF *ZINA***

Some say that the *hadd* of the male and female *zani* is 100 lashes for the *muhsan (married)* and non-*muhsan* equally, without difference between them due to His saying *Ta'ala*, "*The female zani and male zani, lash each one of the two one hundred lashes, and let not pity for the two seize you in the deen of Allah*" [TMQ An-Nur:2]. They said, It is not permitted to abandon the Book of Allah via the way of definitiveness (*qat'*) and certainty (*yaqeen*) for single individual reports (*akhbar al-ahad*), wherein falsehood is possible, and because this leads to abrogating the Book by the *Sunnah* which is not permitted. Most of the people of knowledge of the *Sahabah*, Tabi'in and those after them of the scholars of (different) cities in all periods say that the non-*muhsan* is lashed 100 lashes and the *muhsan* is stoned until he dies. This is because the Messenger (saw), "**stoned Ma'iz**", and due to what was narrated from Jabir bin Abdullah, "**that a man committed *zina* with a woman, so the Prophet (saw) commanded regarding him so he was lashed. Then he was told he was a *muhsan,* so he commanded regarding him and he was stoned**."

The one who examines the evidences sees that His saying *Ta'ala*, "*The female zani and male zani, lash each one of them one hundred lashes*" [TMQ 24An-Nur:2], is general. This is because the word '*zani*' (male) and '*zaniya*' (female) is of the words of generality, so it includes the *muhsan* and non-*muhsan*. When the *hadith* came which is his (saw) saying, "**O Unays, go tomorrow to this woman. If she confesses, stone her**", and it is proven that the Messenger of Allah (saw) stoned

Ma'iz after he asked about his *ihsan*, and he stoned Al-Ghami*diyyah* beside other sahih *ahadith*. So the *hadith* specified the *ayah*. Thus, these *ahadith* specified this general meaning of the *ayah* in other than the *muhsan* and excluded the *muhsan* from it. Accordingly, the *ahadith* specified this general meaning did not abrogate the Qur'an. The specifying the Qur'an by the *Sunnah* is permissible and it happened in numerous *ayat* which came general and the *hadith* specified them.

The hukm shar'i which the *Shar'i* evidences ie the Book and *Sunnah* indicate is that the punishment of *zina* is lashing the non-*muhsan* 100 lashes, acting according to the Book of Allah, and banishment one year acting according to the *Sunnah* of the Messenger of Allah. However, the banishment is permissible and not obligatory, and it is left to the Imam, so if he wills, he lashes him and banished him one year; and if he wills, he lashes him but does not banish him. However, it is not permitted to expel him without lashing him, because the punishment is lashing. As for the punishment of the *muhsan*, it is stoning until he dies, acting according to the *Sunnah* of the Messenger of Allah (saw), which came as specifying of the Book of Allah. it is permitted regarding the *muhsan,* to combine the lashing and stoning on, him so he is lashed first then stoned. It is also permitted to stone him only, without lashing. However, it is not permitted to solely lash because the obligatory punishment is the stoning.

As for the evidence of the punishment of the non-*muhsan*, it is the *ayah* of lashing which is His saying *Ta'ala,* "*The female zani and male zani, lash each one of them one hundred lashes*" [TMQ An-Nur:2]. As for the evidence of banishment, it is numerous *ahadith*. Of them, It is narrated Abu Hurayrah "**that the Prophet (saw) judged regarding the one who committed *zina* and was not *muhsan* with expulsion for one year and carrying out the *hadd* on him**." It is also narrated from Ubadah bin As-Samit who said, The Messenger of Allah (saw) said, "**Take from me, take from me. Allah has ordained for them a way. The virgin (*bikr*) with the virgin, One hundred lashes and expulsion for a year**." The *Sahabah* followed this, so they lashed the non-

*muhsan* and banished him one year. However, it has been proven from the Prophet (saw) that he lashed and did not banish. Abu Dawud narrated from Sahl bin S'ad, "**that a man from Bakr bin Layth confessed to the Prophet (saw) that he committed *zina* with a woman and he was a virgin so the Prophet (saw) lashed him one hundred. He (saw) asked him for the evidence against the woman when she denied the allegation, but he did not come up with anything. So the Prophet (saw) lashed him the *hadd* of slander, eighty lashes**." In this *hadith* the Messenger lashed the *zani* and did not banish him. Another *hadith* came that the Prophet (saw) said, "**If the slave girl of one of you commits *zina*, let him lash her**", which indicates that banishment is permissible and not obligatory. So the Imam can lash and banish, and he can lash without banishment, because the Messenger lashed and banished and he lashed without banishing.

The *hadd* of the non-*muhsan* was made banishment with lashing even though the *ahadith* are conflicting with each other over this matter. In most of them lashing is combined with banishment, and also the Messenger lashed without banishment; the *hadd* is common between the *ahadith*. One should not say in the *hadith*, "**If the slave-girl of one of you commits *zina***", and in the *hadith* of Sahl bin S'ad that this was before the legalisation of banishment, because it was not proved that the *ahadith* of banishment preceded the *ahadith* of non-banishment. So the date remains unknown, and hence it is not known which *ahadith* came before the other, thus abrogation is negated and there is no outweighing factor for one over the other, so both are acted upon. However, the fact that the Messenger ignored banishment at times and did it at times, is a conjunction that it is permissible and not obligatory. Accordingly, the *hadith* that mentions the extra came with extra, so that extra is permissible and not obligatory. The obligatory is that which is mentioned in all *ahadith,* whether the one with the extra or that without the extra ie that which the Messenger did in all situations and he never left at all, which is the lashing. That which is permissible for the Imam to do it or not to do, is what was mentioned in some *ahadith* and not mentioned in others ie that which the

Messenger did and ignored which is banishment. There occurred banishment with lashing from the *Sahabah,* who are more knowledgeable with the objectives of the *Shar'*. Umar (ra) banished from Madinah to Ash-Sham, and Uthman (ra) banished to Egypt and ibn Umar banished his female slave to Fadak. The banishment mentioned in the *ahadith* according to the *Shar'* is moving the *zani* outside the locality of his residence, such that he is deemed as foreign, and this is the meaning of banishment well-known to the *Sahabah*.

As for the evidence for the punishment of the *muhsan*, there are numerous *ahadith*. It is narrated from Abu Hurayrah and Zayd bin Khalid who said that a man of the Bedouins came to the Messenger of Allah (saw) and said, "'**O Messenger of Allah, I adjure you by Allah that you do not judge except by the Book of Allah', and the other litigant who was more knowledgeable than him said, 'Yes, judge between us by the Book of Allah.' The Messenger of Allah (saw) said, 'Speak.' He said, 'My son was an employee for this one and he committed *zina* with his wife. I was told that there was stoning upon my son, so I ransomed him from it with one hundred sheep and newborn ones. Then I asked the people of knowledge and they informed me that upon my son is one hundred lashes and one year's banishment, and upon this one's woman is stoning.' The Messenger of Allah (saw) replied, 'By the One in whose hand is my soul, verily I will judge between you by the Book of Allah. The newborn sheep and the sheep have to be returned back and upon you son is one hundred lashes, and one year's banishment. O Unays',—he said to a man from the tribe of Aslam,—'go tomorrow to this one's wife and if she confesses, stone her.' He went to her and she confessed so the Messenger of Allah (saw) gave his order regarding her, and she was stoned**." So the Messenger commanded with the stoning of the *muhsan* and did not lash him. It is narrated from Ash-Sh'abi 'that when Ali (ra) stoned the woman, he lashed her on Thursday and stoned her on Friday, and said, I lashed her according to the Book of Allah and stoned her according to the *Sunnah* of the Messenger of Allah (saw).'

It is narrated from Ubadah bin As-Samit who said, The Messenger of Allah (saw) said, "**Take from me, take from me. Verily Allah has**

**ordained a way for them. For the virgin with the virgin, one hundred lashes and expulsion for a year. And for the married (*thayyib*) with the married, one hundred lashes and stoning**." So the Messenger says, the punishment of the *muhsan* is lashing and stoning, and Ali (ra) lashed the *muhsan* and stoned her. It is narrated from Jabir bin Samara that the Messenger of Allah (saw) stoned Ma'iz bin Malik and did not mention lashing. Al-Bukhari narrated from Sula*iman* bin Buraydah that the Prophet (saw) stoned Al-Ghami*diyyah* and did not mention lashing. Muslim reported that the Prophet (saw) had commanded regarding a woman from Juhaina, so her clothes were fastened around her, then she was stoned, and lashing was not mentioned. This indicated that the Messenger stoned the *muhsan* and did not lash him, and he said, "**The muhsan/married (*thayyib*) with the muhsan/married (*thayyib*), one hundred lashes and stoning**." This indicated that stoning is obligatory, whereas lashing is permissible, and it is left for the opinion of the *Khaleefah*. The *hadd* of the *muhsan* is made lashing with stoning, by combining between the *ahadith*. No one should say regarding the *hadith* of Samara, that he (saw) did not lash Ma'iz, but rather restricted himself to stoning him, so this is an abrogator of the *hadith* of Ubadah bin As-Samit which says, "**The muhsan (*thayyib*) with the muhsan (*thayyib*), one hundred lashes and stoning**." One should not say that, because nothing is proved to indicate that the *hadith* of Ma'iz came after the *hadith* of Ubadah. Without such proof regarding the two *hadith*s, the non-mentioning of lashing does not mean abandoning it, nor abrogating its hukm. The absence of the proof regarding to which of them came after the other negates the abrogation, and there is no outweighing factor (*murajjih*) for one of them over the other. What came in the *hadith* of an increase (*ziyada*) over stoning, is considered a permissible matter not obligatory, since the obligatory is stoning and what increases over that is optional for the Imam, due to combining the *ahadith*. The *muhsan* is the one who has had intercourse in a valid marriage, and is free, mature and sane; this is the definition of the *muhsan* in the subject of *zina*. Everyone else is not a *muhsan*. It is stipulated in the lashing and stoning to remove any uncertainty

(*shubha*) such that it is pure *haram*, and that the perpetrator did it with free will, such that he is not forced to commit *zina* in a compelling way, and that he is mature and sane for there is no *hadd* on a child, nor on the insane or the drunkard, without his free will. *Zina* must be proved against him with evidence of *zina,* which came in the *ahkaam Shar'iyyah,* due to what Abu Hurayrah narrated and said, The Messenger of Allah (saw) said, "**Remove away the *hudud* as much as you can find a reason for their removal**." It is narrated from Aisha who said, The Messenger of Allah (saw) said, "**Avert the *hudud* from Muslims as much as you can. So if there is a way out for him, let him off. For verily, it is better for the Imam to err in pardon than to err in punishment**." It is narrated from Ali (*marfu*'), "**Avert the *hudud* because of uncertainties (*shubhat*)**." Moreover, the person forced in a compelling way is not punished over his action, due to the Messenger (saw)'s saying, "**Lifted from my Ummah is error, forgetfulness and what is forced upon them.**" It is also because the Messenger did not inflict punishment upon the *zani* except after *zina* was proved against him.

Whenever *zina* is proved, inflicting the *hadd* must be without delay. It is invalid to suspend it or intercede in it. It is narrated from Abu Hurayrah, from the Prophet (saw) who said, "**A *hadd* that is acted upon in the earth is better for the people of the earth than having rain for forty days**." It is also narrated from ibn Umar from the Prophet (saw) who said, "**Whoever intercedes to prevent a *hadd* of the *hudud* of Allah, he is opposing Allah in His affair**." However if the one upon whom there is a *hadd* is ill, he is postponed until he recovers from his illness if his recovery is expected. If his recovery is not expected, he is lashed lightly. It is narrated from Abu Umamah ibn Sahl from Said bin S'ad bin Ubadah who said, "**There was within our dwellings a weak prematurely born man. The people of the community were surprised to find him on top of one of their slave girls committing evil with her. So S'ad bin Ubadah mentioned that to the Messenger of Allah (saw) and that man was a Muslim. So he said, 'Lash him his *hadd*.' They said, 'O Messenger of Allah, he is weaker than you think. Were we to lash him one hundred, we would kill**

**him.' So he said, 'Take for him a bundle of one hundred branches stripped of leaves, then lash him once with it.' He (S'ad) commented, 'They did (this)**.'" This *hadith* indicates that the weak person who cannot bear the *hadd*, whether he were weak from an illness whose recovery is not expected or of weak structure, is lashed lightly. It came in another narration of the *hadith*, "**Were we to carry him to you, his bones would dislocate. He is nothing but skin on bone**." So weakness, in unrestricted fashion, is lashed lightly, and illness is weakness. The meaning of the *hadith* is that if he gets stronger after weakness, and recovers after illness, he is granted a respite, so that he is given the *hadd* as it came.

Similarly the pregnant woman is given respite until she delivers her pregnancy, and the suckling mother until her child weaned. it is narrated from Abdullah bin Buraydah from his father who said, "**Al-Ghamidiyyah came and said, 'O Messenger of Allah, verily I committed *zina* so purify me', and he sent her back. When it was the morrow, she said, 'O Messenger of Allah, why do you send me back. Perhaps you send me back as you sent Ma'iz back. By Allah, I am pregnant.' He (saw) said, 'If that is not the case, then go away until you give birth.' When she gave birth, she came to him with the child in rags. She said, 'I have given birth to this one.' He said, 'Go away and suckle him until you wean him.' So when she weaned him, she came to him with the child, with a chunk of bread in his hand. She said, 'Here, O Prophet of Allah, I have weaned and he has eaten food.' So he turned the child over to a man of the Muslims, then he gave his command regarding her. A trench was excavated for her up to her chest, and he commanded people so they stoned her**." This *hadith* is explicit in indication that the pregnant woman is given respite until she gives birth, and the suckling woman is given respite until she weans her child.

**THE EVIDENCE (*AL-BAYYINA*) OF *ZINA***

*Zina* is proved by one of three matters;

Firstly; Confession; This is the explicit confession of the *zani* four times, and he does not recant his confession until the *hadd* is completed upon him. If he recants from his confession or flees, (the

*hadd*) upon him is waived from him. The evidence for that is what was narrated from Abu Hurayrah who said, "**A man of the Muslims came to the Messenger of Allah while he was in the mosque and said, 'O Messenger of Allah, I have committed *zina*.' He turned away from him until he replied four times. When he testified over himself four times, the Prophet (saw) called him and said, 'Are you insane?' He said, 'No.' He (saw) said, 'Are you a *muhsan*?' He replied, 'Yes.' So the Prophet (saw) said, 'Go with him and stone him**.'" It is narrated from Abdullah bin Buraydah from his father that Ma'iz bin Malik Al-Aslami came to the Messenger of Allah (saw) and said, "'**O Messenger of Allah, verily I committed *zina* and I wish that you purify me.' He sent him back, and when it was the morrow he came to him and said, 'Verily I have committed *zina*', so he sent him back the second (time). So the Messenger of Allah (saw) sent to him people, 'Do you know any impairment in his mind (such that) you disavow something from him?' They said, 'We know nothing of him except of complete mind from our sound ones according to what we see.' He came to him the third (day), so he sent to them again asking about him and they informed him that there is no impairment in him or in his mind. When it was the fourth testimony, a trench was excavated for him, then he gave orders regarding him, so he was stoned**." It is narrated from Abdullah bin Buraydah from his father who said, "**Al-Ghamidiyyah came and said, 'O Messenger of Allah, verily I committed *zina* so purify me', and he sent her back. When it was the morrow, she said, 'O Messenger of Allah, why do you send me back. Perhaps you send me back as you sent Ma'iz back. By Allah, I am pregnant.' He said, 'If that is not the case, then go away until you give birth.' When she gave birth, she came to him with the child in rags. She said, 'I have given birth to this one.' He (saw) said, 'Go away and suckle him until you wean him.' So when she weaned him, she came to him with the child, in his hand a chunk of bread. She said, 'Here, O Prophet of Allah, I have weaned and he has eaten food.' So he turned the child over to a man of the Muslims, then gave orders regarding her. A trench was excavated for her up to her chest, and he commanded people so they stoned her**." His saying in

the *hadith*, "**If that is not the case then go away**", means if you refuse to purchase your soul and turn away from your saying, then go until you give birth then you will be stoned after that. 'If (*Imma*)' here is with a '*kasra*' on the '*hamza*' and '*shadda*' on the '*meem*.' This is the evidence that the stoning is proved by confession four times; however if the one confessing recants his confession and flees during stoning, (the *hadd*) upon him is waived. It is narrated from Abu Hurayrah that when Ma'iz felt the touch of the stones, he fled fast until he passed a man who had with him a camel jawbone so he struck him with it and people struck until he died. That was mentioned to the Messenger of Allah that he fled when he felt the touch of the stones and felt death, the Messenger of Allah (saw) said, "**If only you left him?**" Similarly lashing is proved by confession. It is narrated from Sahl bin Sa'd that a man came to the Prophet (saw) and said, "**that he committed *zina* with a woman whom he named so the Prophet (saw) sent to the woman, called her and asked her of what he said, but she denied the allegation. So he inflicted the *hadd* upon him and left her**." This *hadith* indicates that the lashing is proved by confession.

Confession to *zina* suffices one time, and four times is not needed. The evidence for that is what came in the above mentioned *hadith* of 'Abdullah bin Buraydah which indicates that the Messenger stoned her before she confessed four times, and in the *hadith* of Jabir, "**that a man confessed before the Prophet (saw) that he committed *zina* with a woman so the Prophet (saw) gave orders regarding him and he was lashed the *hadd*. Then he was informed that he is a *muhsan* so he was stoned**." In the above-mentioned *hadith* of Sahl bin Sa'd, the man confessed once and the Messenger (saw) gave him the *hadd*. So these *ahadith* are evidence that confessing once suffices to establish *zina*. As for what came in the other *ahadith* of repeating the confession four times, and of the saying of the Messenger, "**You have testified against yourself four testimonies**", and other *ahadith*, they do not indicate that it is the condition for confession to be is four times, but only indicate the verification of the confession and the permissibility of delaying the *hadd* after confession. They do not indicate that the condition of the confession, is that it be four (time)

particularly since it has been proved that the Messenger executed the *hadd* with a single confession. This is corroborated by what came in the above-mentioned *hadith* of Al-Ghamidiyyah since she said, "**O Messenger of Allah, why do you send me back? Perhaps you send me back as you sent Ma'iz back?**", and the Messenger did not deny that from her. Were the confession being made four times a condition, he would say to her, 'I sent him back because he did not confess four (times).' All this indicates that the quadrupling of the confession is not a condition; rather only one confession suffices.

Secondly; To testify against him; this is done in one sitting, over one zina, with four men among the Muslims, free and trustworthy, accusing him with *zina* explicitly. There is no disagreement regarding stipulating four due to the saying of Allah *Ta'ala*, "*And those who come with indecency among your women, let there testify four among you against them*" [TMQ An-Nisa':15]. And He *Ta'ala* said, "*And those who accuse chaste women and bring not four witnesses, lash them eighty lashes*" [TMQ An-Nur:4]. And He *Ta'ala* said, "*Why did they not come with four witnesses over it? And if they bring not witnesses, then those are the liars before Allah*" [TMQ An-Nur:13]. And Sa'd bin Ubadah said to the Messenger of Allah (saw), "'**Do you see that if I found a man with my wife, should I give him respite until I come with four witnesses?' The Prophet (saw) said, 'Yes**.'" These evidences are definite in indication that proving *zina* must have four men, who testify a clear explicit testimony, describing the process of *zina* with a complete description. If the minimum number (*nisab*) of four is not fulfilled, *zina* is not proved. And if one of them failed in the description, or gave a non-explicit description, *zina* is not proved because the evidence of zina came in an explicit text, so it is necessary to be restricted with the text.

Thirdly; Pregnancy; that is the appearance of pregnancy on her. If the woman became pregnant and she has no husband, then a hadd is incumbent upon her due to the saying of Umar (ra), 'Stoning is obligatory upon all who committed *zina* among men and women if he was *muhsan*, if the evidence is proved or if there was pregnancy and confession.' It was narrated from Ali (ra) that he said, '**O people, *zina***

**is of two types; Secret *zina* and open *zina*. The secret *zina* is where the witnesses testify, so the witnesses becomes the first who stone, and open *zina* is where pregnancy appears or a confession is made, so the Imam is the first who stones**.' This is the opinion of the senior *Sahabah,* and there was no one to oppose them in their time. This matter is a subject of contest, but there was no one to dispute it, so it became *ijma'*.

However, in the situation of pregnancy, the *hadd* is averted from the woman if a reason for the pregnancy is shown, because there would then be an uncertainty, and *hudud* are averted by uncertainties. If the woman said that she became pregnant due to a man's water entering her private parts without *zina,* whether by her action or the action of another, or, 'I was forced into *zina* in a compelling way', or she gave some other reason as the cause of pregnancy, which creates uncertainty, then the hadd is averted and it is not executed upon her. Sa'd has narrated,; Khalaf bin Khaleefah narrated to us,; that Hashim narrated to us, 'that an unmarried woman was taken to 'Umar (ra) and she had become pregnant. So 'Umar (ra) asked her and she said: I am a woman with a heavy head. A man had intercourse with me while I was sleeping, and I did not wake up until he finished. So he averted the *hadd* from her.' Al-Bara bin Subra narrated from 'Umar (ra), 'that a pregnant woman was brought to him and she claimed that she had been forced. So he said: Let her go.' And he wrote to the commanders of the armies, 'that no one should be killed without his permission.' Umar's action, even if not a *Shari'i* evidence, is however a *Shari'i* rule so it is allowed to imitate him in this ie it is permitted for the *Khaleefah* to command not to judge with killing after completion of the causes of the judgement except by his permission.

This is the evidence of *zina,* and *zina* is not proved with other than this absolutely. It is not included in the texts of testimony, nor under the texts of evidence; rather it is a specific evidence for a specific matter. It is considered an inseparable part of the rules of the *hadd* of *zina,* so it is a text and it is obligatory to be restricted to this text. Accordingly, *zina* is not proved by the testimony of a doctor against a virgin that she is deflowered (*thayyib*) or that she committed *zina* or that she has

had sexual intercourse or the like. Likewise it is not proved by the testimony of a midwife (*qabila*) nor proved by anything other than these three evidences, even if the judge verified *zina,* because the objective is not establishing an evidence upon *zina,* but rather establishing a specific evidence that the *Shar'* designated. The objective is not establishing the indications and matters that prove to the judge the occurrence of *zina,* or create conviction in the judge that *zina* had occurred. Rather the objective is proving *zina* by this specific evidence, not merely proving *zina,* but rather its proof by specific evidence. Accordingly, we find the Messenger (saw) express his conviction that a known woman is a *zaniya* but despite that he did not inflict the *hadd* upon her, due to the non-existence of the evidence. It is narrated from ibn Abbas, who said, "The Messenger of Allah (saw) said, ' **If I had to stone anyone without evidence, I would have stoned such and such woman, for there has appeared from her suspicion in her speech and appearance, and those who visit her**.'" It is also narrated from ibn Abbas, "**that the Messenger of Allah (saw) did the oath of mutual cursing li'aan between Al-'Ajlani and his wife. So Shaddad bin Al-Hadi said, Is that the woman of whom the Messenger of Allah (saw) said, 'If I had to stone anyone without evidence I would have stoned her?' He said, 'No, that is a woman who spoke bad about Islam**.'" In the words of Al-Bukhari, "**she used to display evil-deeds in Islam**" ie she would manifest indecency, but the evidence of *zina* was not proved against her, neither by an evidence or confession. There came in the *hadith* of ibn Abbas in the slander (*qadhf*) of Hilal bin Umayyah of his wife with Shareek bin Samhaa' and the revelation of the *ayah* of mutual cursing (*li'aan*) that the Prophet (saw) turned away and sent to the two. So Hilal came and they witnessed the Prophet (saw) saying, "'**Verily Allah knows one of you is a liar, so it there a repenter among you?' Then she stood and testified. When it was at the fifth (time), he stopped her and they said, 'It is obliging.' She hesitated and recoiled until we believed that she had recanted. Then she said, I will not disgrace my people the rest of the day (throughout time) and she continued. So the Prophet (saw) said: ' observe her. If she came with him (the child) dark eyed,**

**with wide buttocks, thin legged then he is of Shareek bin Samha**." She gave birth to a child of this description so the Prophet (saw) said, "**Were it not for what passed of the Book of Allah, there would be a matter between me and her**", and in the narration of Al-Bukhari "passed **of the rule of Allah**." So in this *hadith,* there appeared indications in an explicit form, that she is a *zaniya (adulterer)*, and the Messenger expressed his conviction that she is a *zaniya*; despite that he did not inflict the *hadd* upon her, because *zina* was not proved by the *Shari'ah* evidence with which the Qur'an came. This corroborates that the person is not given the *hadd* except if *zina* is proved by an evidence specific to *zina* ie confession, four witnesses or pregnancy.

**THE *HADD* OF HOMOSEXUALITY (*AL-LIWAT*)**

The punishment of homosexuality is not the punishment of *zina,* because *zina* is not homosexuality, since the reality of this one is not the reality of that one, and each differs from the other. Homosexuality is not a type of *zina* such that one says that it enters under the generality of the evidences which came regarding *zina,* because *zina* is the penetration of the man into the private part of a woman, while homosexuality is penetration of the man in the rear part of a male. Penetration in the female private part is not insertion in the rear part, thus this is other than that. Homosexuality is not also compared with *zina,* because the text that came regarding *zina* is unreasoned (has no illah), so that analogy becomes valid by the unity) of the reason (*'illah*). Moreover, entering the woman in her rear part is not homosexuality, nor is it called homosexuality, because homosexuality is not entering the rear part, but rather it is the man entering the man ie insertion of the man in his rear part. Hence *zina* is not homosexuality, nor is it measured with it. As for the *hadith*, "**If the man enters the man, then they are two the *zani*s, and if the woman enters the woman then they are two *zanis***", in its chain is Muhammad bin Abdurrahman whom Abu Hatim accused him of lying, and Al-Bayhaqi said 'I do not know him' (so) the *hadith* is

rejected (*munkar*). Even if it is assumed as authentic, it means comparison ie like two *zanies*, with the evidence that it is not proved from the Messenger of Allah (saw) that he stoned in homosexuality, nor that he ruled with that. It is proved that he said, "**Kill the doer (*fa'il*) and the one to whom it is done (*maf'ul*)**" So were his saying "**two zanis**" literal, the *hadd* of homosexuality would be as the *hadd* of *zina*. Even the *hadith* they narrate regarding the stoning of the homosexual, they narrate it with the stoning of the virgin ie stoning the *muhsan* and non-*muhsan*, and this means that the reality of homosexuality is not the reality of *zina*; thus the punishment of homosexuality is not the punishment of *zina*.

As for the *Shari'i* rule regarding the punishment of homosexuality, it is killing whether he were *muhsan* or non-*muhsan*. So everyone against whom homosexuality is proved, whether he were the doer or the one to whom it is done, is killed

as the *hadd*. The evidence for that is the *Sunnah* and *Ijma as-Sahabah*. As for the *Sunnah*, from Ikrimah from ibn Abbas who said: The Messenger of Allah (saw) said, "**Whoever you find doing the action of the people of Lut, kill the doer and the one to whom it is done**"; it is narrated by the five except An-Nasai. Al-Hafidh said about it : 'Its men are reliable except there is *ikhtilaf* (disagreement) regarding it.' Ibn At-Tallaa' said in his '*Ahkam*': 'It is not proved from the Messenger of Allah (saw) that he stoned over homosexuality, nor that he ruled by it, and it is proved that he said, "**Kill the doer and the one to whom it is done**" as narrated from him by ibn Abbas and Abu Hurayrah. This is the evidence from the *Sunnah* that the rule of homosexuality is killing. As for what was narrated from Said bin Jubair and Mujahid from ibn Abbas 'in the virgin, it is found regarding homosexuality that he is stoned', it means killing by stoning; and not that his *hadd* is stoning. What proves that is the evidences which came regarding killing the doer and the one to whom it is done, are unrestricted without differentiating between the virgin and married (*thayyib*), while stoning is the *hadd* of the (*thayyib*) only. The text of the *hadith* decides what is done with the virgin, which indicates that it is not the *hadd* of stoning. Hence the *hadith* of ibn Abbas via the way of Said ibn Jubayr

and Mujahid is not in conflict with the hadeeth of Ibn Abbas via the way of Ikrimah, Where each of them indicates killing. However, the *hadith* of stoning indicates killing with a specific style and the *hadith* of killing indicates of unrestricted killing. So the rule is killing, so it is permitted to kill by stoning, or to kill by hanging, or to kill by bullets, or to kill by any means. The rule is killing and not the style or tool by which killing takes place.

As for *Ijmaa' as-Sahabah*, the *Sahabah* differed in the style of killing the homosexual; however, they had a consensus (*ijmaa'*) on killing him. Al-Bayhaqi extracted from Ali (ra) that he stoned a homosexual, and Al-Bayhaqi extracted from Abu Bakr that he gathered the people concerning a man who was married just as women are married and he asked the companions of the Messenger of Allah (saw) about that. The most severe among them on that day was Ali (ra). He said, **'No nation among the nations has disobeyed with this sin except one nation with whom Allah did what you know. We view that we should burn them with fire.'** Ja'far bin Muhammad narrated from his father from Ali in other than this incident who said, **'He is stoned then burnt with fire.'** Al-Bayhaqi extracted from ibn Abbas that he was asked about the *hadd* of the homosexual and said, **'The highest building in the town is looked for then he is thrown from it upside down, then he is followed by stones.'** It is also narrated from Ali (ra), **'He is killed by the sword then burnt due to the enormity of the sin.'** Umar (ra) and Uthman (ra) adopted, **'that a wall is collapsed upon him.'** All these opinions collectively indicate killing, even if they differ on the style of killing. Therefore *ijmaa'* ie *Ijmaa' as-Sahabah* has convened that the homosexual's rule is killing, whether he was the doer or the one to whom it is done, *muhsan* or non-*muhsan*. *Ijmaa' as-Sahabah* is a *Shari'i* evidence, so what about if it is corroborated by the *Sunnah*? Hence the *hadd* determined by the *Shar'* for homosexuality is not the *hadd* of *zina*; rather it is killing, irrespective of the style with which he is killed.

The evidence of homosexuality is not like the evidence of *zina*. Rather, it is the evidence of a *hadd* other than the hadd of *zina* because as

long as it is not valid that homosexuality is *zina* so the evidence for it is not valid to be the proof of *zina*. Thus, it is included in the evidences of the remaining *hudud*. Hence, homosexuality is proved by confession, and it is proved by the testimony of two men, or one man and two women, like the evidence of theft and other evidences of the *hudud*. It is stipulated in the *hadd* of homosexuality that the homosexual, whether doer or the one to whom it is done, be mature, sane and he must have done it willingly. Moreover, homosexuality is proved against him by the *Shari'i* evidence, which is the testimony of two men or one man and two women. If he were a child, insane, or forced in a compelling way, there is no *hadd* upon him.

**THE RULE OF ENTERING THE WOMAN IN HER REAR PART**

Entering the woman in her rear part is *haram,* so it is forbidden for the man to enter the woman in her rear part. Some Imams consider it *zina.* Though it is not called homosexuality, it is like homosexuality. And it has been called homosexuality with the woman, where it is understood to be entering the woman in her rear part. However, when homosexuality is designated in unrestricted terms, it means man entering the man, without another meaning. So it is not right to call entering the woman in her rear part homosexuality. Hence, the forbiddance of entering the woman in her rear part does not come from its being *zina*, nor from its being homosexuality, since it is not *zina*, nor is it homosexuality; rather it comes from the *Shari'i* evidences that denote it. Allah *Ta'ala* said, "*When they have purified themselves, go in unto them from where Allah commanded you*" [TMQ Al-Baqarah:222]. The text determined entering a woman from where Allah commanded of entering her, which is the female private part (*farj*). It's meaning (*mafhoom*) is not to enter into her in other than the place that Allah commanded you to enter in. This is also due to what Allah commanded regarding marriage (*nikah*), such as His saying, "*Marry of your choice*" [TMQ An-Nisa:3], and His saying: "*And marry the widow/widower (ayama) among you*" [TMQ An-Nur:32], and His saying, "*Marry them with the permission of their folk*" [TMQ An-

Nisa:25], which is marriage (*zawaj*). The command is determined that men approach women in the place that Allah commanded with which is the *farj (female private part)*. Ali bin Abi Talha said that with regard to, "*Go in unto them from where Allah commanded you*" [TMQ Al-Baqarah:222], ibn Abbas said, ' in the *farj*, and do not exceed that to another place. Whoever does something of that has transgressed.' Mujahid said regarding this, "'*From where Allah commanded you*' [TMQ Al-Baqarah:222], meaning the *farj*." One should not say that this refers to His saying, "*Keep away from women during their menstruation*" [TMQ Al-Baqarah:222], because (of) the *ayah*, "*They ask you concerning menstruation. Say*; *it is a harm, so keep away from women during menstruation until they have become clean. When they have cleaned themselves, go in unto them from where Allah commanded you*" [TMQ Al-Baqarah:222]. One should not say that, because menstruation is a period not a place. Had it been intended, He would have said 'Go in unto them in other than the menstruation period'. He instead stated with the word *hayth*, which means where, thus indicating the place. So it cannot be diverted to menstruation due to the existence of 'where', which does not indicate other than the place, so its meaning is not the menstruation but the place ie 'Go in unto them from where Allah commanded you' ie in the place He commanded you with namely the *farj,* for it is the place that He commanded you to go in unto in the *ayat* of *nikah* and marriage (*ziwaj*). This is corroborated in that He followed that with the *ayah* following it with the explanation of the situation of the women in that they are for offspring (*nasl*) and said: Go in unto what produces offspring, and that cannot be except in the *farj*. Thus He said, "*Go in unto them from where Allah commanded you. Verily Allah loves those who repent and He loves those who purify themselves. Your women are your tilth (harth), so go in unto your tilth how you wish*" [TMQ Al-Baqarah:222/3]. Verily this *ayah*, "*Your women are your tilth*" [TMQ Al-Baqarah:223], is an explanation of what came, before it which is His saying: "*Go in unto them from where Allah caommanded you*" [TMQ Al-Baqarah:222]. So it is an explanation of the place that Allah commanded with namely the *farj,* and His saying, "*Your tilth*" is a

metaphoric expression for the place of planting. His saying, "*However (anna) you wish*" [TMQ Al-Baqarah:223] ie the manner you wish, because '*anna*' means however, and is not used with to mean wherever (*min ayna*). The word '*anna*' is used to mean 'however' and not used to mean 'wherever', except rarely. Even if it were assumed that it is used in the two meanings, then His saying, "*Your tilth*" is a conjunction that it's meaning here is not wherever. This conjunction came in two places for He said: "*Your women are your tilth*" and this is sufficient, because the meaning of their being tilth is that they are entered in the place of tilling (*harth*). However, He repeated it and He reiterated the word 'tilth' during His command to enter, so He said, "*Go in unto your tilth however (anna) you wish*". He did not say: 'Go in unto them (anna) you wish' for emphasis and to negate any likelihood. So it is as if Allah says, 'There is no sin in going in unto women in any manner you wish in the position of tilling' so His saying, "*Go in unto your tilth*", specifies going in unto women in the *farj*. In addition to that, the cause of the *ayah*'s revelation, which is the subject upon which it was revealed, indicates that the subject is the question of how to go in, so it is specific to it. It is narrated from Sufyan bin Said Ath-Thawri that Muhammad bin Al-Munkadir narrated to them that Jabir bin Abdullah informed him that, "**the Jews said to the Muslims that whoever goes in unto his wife while she is turning her back (to him), the child will come squint-eyed, so Allah revealed: '*Your women are your tilth, so go in unto your tilth as you wish*'. Ibn Juraij said in the *hadith*, So the Messenger of Allah (saw) said, 'Frontward or backwards, if it was in the *farj*.'**" Hence His saying *Ta'ala*, "*Go in unto them from where Allah commanded you*" indicates the forbiddance of going in unto them in other that where Allah commanded with. His saying: "*Your women are your tilth*" (the *ayah*) is an explanation of what Allah commanded going in to, namely the *farj*, in addition to what came in the *ayat* of *nikah* and marriage. This is an evidence for the forbiddance of going into her rear part. There are also *ahadith* that explicitly state the prohibition of going in unto the woman from her rear part. It is narrated from Khuzaimah bin Thabit, "**that the Messenger of Allah (saw) prohibited the man going into the woman**

**in her rear part**." It is narrated from ibn Abbas who said: The Messenger of Allah (saw) said, "**Allah does not look to a man who enters a man or woman in her rear part**." It is narrated from Amru bin Shuaib from his father from his grandfather that the Prophet (aw) said, "**The one who enters his woman in her rear part is the smaller homosexuality**." It is narrated from Ali bin Talaq who said, "**The Messenger of Allah (saw) prohibited that women be approached in their rear parts. Verily Allah is not shy about the truth**", and Ahmad also extracted it from Abu Muawiya. Imam Ahmad said: Abdurrazaq narrated to us: Mu'ammar informed us from Suhail bin Salih from Al-Harith from Mukhlid from Abu Hurayrah from the Prophet (saw) who said, "**Verily the one who goes into his wife from her rear part, Allah will not look to him**." Ahmad also said: Affan narrated to us, Wahhib narrated to us: Suhail narrated to us from Al-Harith bin Mukhlid from Abu Hurayrah who raised it (to the Prophet) and said, "**Allah does not look to a man who has sexual intercourse with his wife in her rear part**." All these *ahadith* are evidence for forbidding going into women in their rear parts. However, the *Shar'* does not ordain for it a specified *hadd* of punishment so it not of the *hadd*; rather it is included in the category of *ta'zeer*. Hence, it is upon the Imam or judge to measure for it a painful punishment that serves to be a deterrent because punishment, even if it is *ta'zeer*, must be a deterrent. So it must be painful and it is better to leave its assessment to the judge.

**THE *HADD* OF *QADHF***

*Qadhf* is accusing with *zina*, and the slander (*qadhf*) of chaste indiscrete believing women is forbidden; whereas whoever accused a zaniya (adulteress) and comes with witnesses, it is not forbidden. *Qadhf* has been forbidden by the Book and *Sunnah*. He *Ta'ala* said, "*Those who accuse chaste (muhsan) women then do not come forth with four witnesses, lash them eighty lashes and never accept their testimony. And those are the fasiqun*" [TMQ An-Nur:4]. And He *subhanahu* said, "*Verily those who accuse chaste indiscrete believing) women are cursed in the world and the Hereafter and for them is a great torment*" [TMQ An-Nur:23]. It is narrated from Abu Hurayrah

from the Prophet (saw), who said; "'**Avoid the seven mortal sins.' They said, 'O Messenger of Allah, what are they?' 'He replied, 'Associating with Allah, magic, killing the soul that Allah forbade except with justice, eating riba, eating the orphans' property, fleeing on the day of battle and *qadhf* (accusing) the chaste indiscrete women**.'" The word '*muhsanat*' in the two *ayat* and the *hadith* means chaste women (*' afaif*) plural of (*'afeefah*). The word '*muhsanat*' in the Qur'an came with four meanings; firstly the chaste women as came in the two *ayat*. The second, meaning the married women, like His saying *Ta'ala*: "*The married (muhsanat) of the women except those whom your right hands possess*" [TMQ An-Nisa:24] and His saying, "*Married (muhsanat) nor adulterous women*" [TMQ An-Nisa:25]. The third by the meaning of free as opposed to slave women, like His saying *Ta'ala,* "*And whoever of you has not the means wherewith to marry free (muhsanat) believing women*" [TMQ An-Nisa:25], and His saying *Ta'ala*, "*And the free (muhsanat) among the believing women and free (muhsanat) among those given the Book before you*" [TMQ Al-Ma'idah:5], and His saying *Ta'ala*, "*Upon them is half the punishment against the free (muhsanat) women*" [TMQ An-Nisa:25]. The fourth is by the meaning of Islam, like His saying *Ta'ala*, "*If they became Muslims (uhsinna)*" [TMQ An-Nisa:25]. Ibn Mas'oud said, 'Her (*ihsan*) is her Islam.' The word '*muhsanat*' is of the concurrent (*mushtarak*) words like the word '*'ayn,*' having various meanings, and the meaning intended here is one of them, which is the chaste women.

Whoever accused a chaste Muslim woman is lashed eighty lashes on condition that *he did not*

act voluntarily and is legally capable, and that the chaste woman has met the conditions of chastity. The conditions of chastity that oblige inflicting the *hadd* on the one who make the *qadhf* of its owner are five; Intellect (*' aql*), freedom, Islam, chastity from *zina* and that she be old enough for her to have sexual relations.

In order to inflict the *hadd*, one main condition is considered, after completing the *qadhf* with its five conditions namely; That the slanderer does not come with evidence for his slander, due to His saying *Ta'ala*, "*Those who accuse chaste women and do not bring forth*

*four witnesses, lash them*" [TMQ An-Nur:4]. So the absence of evidence is stipulated for lashing them. Similarly non-confession from the slandered person is stipulated for it is of the meaning of evidence. If the slanderer is a husband, another condition is considered which is his rejection of the mutual imprecation (*al-li'aan*); whereas if the wife refuses the *li'aan*, she is stoned.

**THE *HADD* OF DRINKING *KHAMR* (*KHAMR*)**

*Khamr* (*alcohol*) has been forbidden by the *ayah* of *Al-Maidah,* namely His saying *Ta'ala*, "*O you who believe, verily khamr, gambling, idols and divining arrows are filth of Satan's work. Avoid them so that you may succeed. Verily Satan only wishes to sow enmity and hatred between you in khamr and gambling, and to avert you from the remembrance of Allah and from prayer. Will you abstain?*" [TMQ Qal-Ma'idah:90-1]. When this *ayah* was revealed, the Messenger of Allah (saw) said, "***Khamr* is forbidden**." In the *hadith* of Abu Said, the Prophet (saw) said, "'**Verily Allah forbade *khamr* (*alcohol*), so whoever this *ayah* reached and he has something of it, let him not drink nor trade.' He said, 'So people faced the streets of Madinah with what was with them of it and shed it**.'"

The meaning of *khamr* that came in the *ayah* is every intoxicating drink not specifically what is taken from grapes only; rather it is (also) what is taken from other than grapes of intoxicating drinks. It is narrated from ibn Umar (ra) who said, Umar (ra) spoke upon the *minbar* of the Messenger of Allah (saw) and said, "**Verily there was revealed the forbiddance of *khamr* which is of five things; Grapes, dates, wheat, barley and honey. And *khamr* is that which overcomes the mind**." Umar (ra) meant by that to notify that the meaning of *khamr* in this *ayah* ie the *ayah* of *Al-Maidah* is not specific to what is made from grapes, but rather it includes that which is taken from other sources. The *hadith* of Anas conforms to this, for Al-Bukhari narrated saying, Musaddad narrated to us, Mu'tamar narrated to us, from his father who said, "**I heard Anas say, I was standing in charge of the community, giving drink to my paternal uncles—and I was the**

**youngest—'*al-fadhikh*' when it was said, '*Khamr* is forbidden.' So they said, 'Invert it', so I inverted it. I said, 'What was their drink?' He said, 'Fresh, ripe dates and unripe dates.' Abubakr bin Anas said, 'It was their *khamr*, and Anas did not deny that**.'" This indicates that the *Sahabah* understood that the forbiddance of *khamr* was the forbiddance of every intoxicant (*muskir*) and this is corroborated (by) what Abu Salamah bin Abdurrahman narrated from Aisha (ra) who said, The Messenger of Allah (saw) was asked about (*al-bit'*) which is a drink of honey, and the people of Yemen used to drink it. So the Messenger of Allah (saw) said, "**Every drink that intoxicates is *haram***." There are numerous *ahadith* that state any drink made from any thing is *khamr* if it intoxicates. It is narrated from Nu'man bin Bashir who said, The Messenger of Allah (saw) said, "**Verily from wheat there is *khamr*, from dates there is *khamr* and from honey there is *khamr***." It is narrated from ibn Umar that the Prophet (saw) said, "**Every intoxicant is *khamr*, and every intoxicant is *haram***". So this proves that *khamr* is that which covers/overcomes (*khamara*) the mind ie veils it, and that every intoxicant is *haram*. Accordingly, every drink that intoxicates and covers the mind is considered *khamr,* whether it is taken from grapes or from maize or dates or barley or coffee or others. So every intoxicant is called *khamr*. In Abyssinia, they take khamr from coffee, which is a *khamr* specific to the Abyssinian Empire. Hence spirit, cologne (*al-kolonia*), the drink of gin and the like are *khamr,* because they are intoxicants and the Messenger says, "**Every intoxicant is *khamr***." Thus *khamr* has a Shar'i meaning other than its linguistic meaning, and this Shar'i meaning is that stated by the Messenger (saw) and came in the *ahadith*. So the forbiddance of *khamr* that came in the *ayah* is the forbiddance of every intoxicating drink, whether taken from grapes or otherwise since all of them are *khamr*.

The forbiddance of *khamr* is not for any reason (*'illah*); rather it was forbidden because it is *khamr* exactly like the forbiddance of carrion for Allah *Ta'ala* said, "*Forbidden for you are carrion…*" [TMQ Al-Ma'idah:3].It is not reasoned so it became *haram* because it is carrion. Likewise Allah *Ta'ala* said, "*Verily khamr, gambling, idols and divining*

*arrows are filth*" to His saying, "*Will you abstain?*" [TMQ Al-Ma'idah:90-1], He did not give reason for its prohibition . Rather, the command to abstain from it

ie forbidding it (is) without reasoning so it is *haram* because it is *khamr and* not for any reason; particularly since it was mentioned that it was forbidden because it is *khamr*. Ibn Abbas narrated from the Prophet (saw) said, "***Khamr* is forbidden because of itself (*'ayn*), and the intoxicant from every drink**" ie it was forbidden because it is *khamr*, and intoxicant of every drink is forbidden, because it is an intoxicant. So there is no reason for forbidding it thus it is not reasoned.

**THE EXTENT OF THE PUNISHMENT FOR DRINKING *KHAMR***

The punishment for drinking *khamr* is one of the *hudud,* so the *hadd* is obliged upon the drinker of *khamr* ie upon the one who drinks any intoxicating drink, due to what was narrated from the Prophet (saw) who said, "**Whoever drinks *khamr*, lash him**." It has been proved that every intoxicant is *khamr,* so the hadeeth includes a little or a lot of it. The *Ijmaa' as-Sahabah* has convened that there is a hadd for drinking, and on lashing the *khamr* drinker. They also agreed that the *hadd* of the drinker is proved and they had a consensus that it is not reduced from forty.

The one who examines the *ahadith* which came from the Prophet (saw) on the subject of lashing of the *khamr* drinker finds that they indicate that the *khamr* drinker is lashed forty, and it is permitted to increase over forty. As for the *ahadith* indicating that the Messenger (saw) lashed forty, Muslim has extracted in the *hadith* of Hudhayl bin Al-Mundhir in the lashing of Al-Waleed that Ali bin Abu Talib (ra) said, "**The Prophet lashed forty, Abu Bakr forty and Umar eighty and all are Sunnah**." At-Tabarani extracted from Abu Said, "**that the Messenger of Allah (saw) struck with two shoes forty in *khamr***." It is narrated from Abu Said who said, "**The lashing at the time of the Messenger of Allah (saw) in *khamr* was forty with two shoes**." And

from Abu Said who said, "**The lashing at the time of the Messenger of Allah (saw) in *khamr* was forty with two shoes. When it was the period of Umar, he made a lash instead of each shoe**." These *ahadith* are explicit in indication that the *khamr* drinker is lashed forty; all of them

indicate forty, textually. The *hadith* of Ali (ra) suffices for that, namely his saying, "**The Prophet (saw) lashed forty**." The *ahadith* indicating that the Messenger (saw) lashed about forty corroborate that. Muslim has extracted from Anas who said, "**A man who had drunk *khamr* was brought to the Prophet (saw) and he was lashed with two palm-leaf stalks about forty**." An-Nasaa'i extracted "**that the Prophet (saw) struck him (the khamr drinker) with shoes about forty**." Ahmad and Al-Bayhaqi extracted, "**So he commanded about twenty men, each one lashing him two lashes with palm-leaf stalks and shoes**", ie the Messenger commanded about twenty men. These *ahadith* do not designate forty strictly, but rather say about forty, so it is permitted to be more and it is permitted to be less. However, the *ahadith* of restricting with forty prevent that it be less than forty, because they stipulated forty, and there are no other *ahadith* that stipulate less than forty. So the possibility of less than forty is negated, and there remains the possibility of if being greater than forty because the linkage of his saying "**forty**" with his saying "**about forty**" negates reducing from forty. Hence, these *ahadith* corroborate the view that the *hadd* is forty, but they (also) give another meaning which is the possibility of increasing over forty. However, there are *ahadith* that do not determine a specific number for the *hadd*; rather they came saying that the Messenger (saw) commanded that the drinker be struck without explaining the extent of that striking. It is narrated from Anas "**that the Prophet (saw) lashed in *khamr* with palm-leaf stalks and shoes, and Abu Bakr lashed forty**." It is narrated from Uqbah bin Al-Harith who said, "**An-Nu'man or ibn Nu'man came with a drinker so the Messenger of Allah (saw) commanded whoever was in the house to strike him. I was among those who struck him, and we struck him with shoes and palm-leaf stalks**." It is narrated from As-Saib bin Yazid

who said, "**We used to be brought a drinker at the time of the Messenger of Allah (saw), in the authority of Abu Bakr and the early period of the authority of Umar and we would stand to strike him with our hands, shoes and garments.**

**Until it was the early period of the authority of Umar, he lashed forty regarding it, until when they transgressed again and became insolent about it he lashed eighty**." It is narrated from Az-Zuhri "**that the Prophet (saw) did not oblige a *hadd* in *khamr,* but rather he would only command those present with him to strike him with their hands and shoes until he says, 'Desist'**." Abu Dawud extracted with a strong chain from ibn Abbas "**that the Messenger of Allah did not set (*yaqit*) a *hadd* in *khamr***." The word '*yaqit*' is from '*tawqeet*) ie he did not put a measure nor fix a limit. These *ahadith* do not mention a specific *hadd* for the *khamr* drinker, rather some of them are explicit that the Messenger (saw) did not oblige a *hadd* in *khamr*. This means that restricting the *hadd* with a specific number ie forty, did not exist at the time of the Messenger (saw), so this contradicts restricting the *hadd* with forty. Rather, the *ahadith* explicitly negate the *hadd* with a specific number, so this is in conflict with the *ahadith* of the *hadd* with forty. Accordingly, these *ahadith* are in conflict with the *ahadith* that restrict the *hadd* with forty. The response to that in relation to the *ahadith* that do not mention a specific number is that they are considered of the subject of the unrestricted (*mutlaq*) ie as if they say that the Messenger (saw) commanded striking the *khamr* drinker and did not mention the extent of hadd that he commanded striking him. The *hadith* of Anas says, "**He lashed in *khamr* with palm-leaf stalks and shoes**", so it is unrestricted. The hadith of 'Uqbah says, **"So the messenger of Allah ordered those who were in the home to strike him"**, so it is unrestricted. It is clear that these two *ahadith* are of the unrestricted; and if there came a text unrestricted by a number or a characteristic, and there came a text restricted by a number or a characteristic, then the unrestricted is borne upon the restricted and the restriction applies upon the whole. Here there came an

unrestricted text, without being restricted by a number and there came a text restricted by a specific *number*, so without doubt the unrestricted is related to the restricted; so the *ahadith* that do not mention the number are related to upon the *ahadith* that mentioned the number. As for the *hadith* of As-Saib, it indicates that they would strike without restriction to a specific number, so it is not of the type of the unrestricted, but of the form of information that there was no specific amount for the *hadd* of *khamr.* So it is like the *ahadith* after it, ie like the *hadith* of Az-Zuhri and ibn Abbas. These *ahadith* that stipulate that the Messenger did not determine the *hadd* for *khamr* constitute a negation and not an affirmation (*ithbat*), so they are explained that according to their knowledge, they did not know that he determined a specific *hadd,* by the evidence that others narrated that the Messenger had defined a specific *hadd*, such as the *hadith* of Abu Said, "**that the Messenger of Allah (saw) struck forty in *khamr* with two shoes**", and like what Abu Dawud narrated from the *hadith* of Abdurrahman bin Azhar, "**that he (saw) commanded lashing the drinker forty**." So the one who negates the definition of the *hadd* negates it according to his knowledge, and this does not contradict the saheeh *hadith* that determines the number. Moreover, these *ahadith* are negation and the *ahadith* of forty are affirmation, and the principle of *Usul* (principles of jurisprudence) is, '**If the negation and affirmation conflict, the affirmation is given precedence over the negation**'; so the *ahadith* that affirm a specific *hadd* are given precedence over the *ahadith* that negate the existence of a specific *hadd*. In addition, using/acting upon **two evidences is better**', thus the negation is explained that it is according to their knowledge and this does not negate that others knew otherwise ie knew that the *hadd* of drinking has a specific *hadd* designated by the Messenger (saw).

From all that, it is clear that the *khamr* drinker is lashed forty, acting according to the *ahadith* that stipulate forty and those that stipulate that it is around forty. So the *hadd* of drinking is a specific *hadd*, which is forty. As for the evidence that it is permitted to exceed forty, but not to decrease under forty, these are the *ahadith* that stipulate about forty which is the *hadith* of Anas, "**He lashed with two palm-leaf**

**stalks about forty**" and the *hadith* of An-Nasaa'i, "**He struck him with shoes about forty**", and the *hadith* of Al-Bayhaqi, "**He commanded about twenty men, and each one lashed him two lashes**." All of them indicate that it is permitted that the lashing be lesser or greater than forty. However, since the Messenger's saying "**forty**" has been proved in numerous *ahadith*, the stipulation of forty negates its being less than forty, thus preventing the possibility of translating the words "**about forty**" with less than forty. There remains its meaning forty or more than forty, and this is an indication of the permissibility of exceeding forty, which is strengthened by the *hadith* of Az-Zuhri that he (saw) "**would command those present with him to strike him with their hands and shoes until he says, 'Desist'**." So when it is linked with the *ahadith* that stipulate "**forty**", it is understood from this that he did not say to them 'Desist' before forty, but it is possible that he said to them 'Desist' after forty; hence exceeding forty is valid. Perhaps this is what the *Sahabah* differed over ie they differed over its measure, so we find Umar (ra) consulting over the *hadd* of the *khamr* drinker. It is narrated from Anas "**that a man who had drunk *khamr* was brought before the Prophet (saw) and he lashed him with two palm-leaf stalks about forty. He said, And Abu Bakr did it, but when it was the period of Umar he consulted the people so Abdurrahman bin Awf said, 'The lightest *hadd* is eighty' so Umar commanded with it**." Ibn Abi Sheeba extracted from Abu Abdurrahman As-Salmi from Ali (ra) who said, **"A group of the people of Ash-Sham drunk *khamr* and interpreted (*ta'weel*) the noble *ayah* so he (meaning Umar) consulted regarding them. I said, 'Ask them to repent and if they repent, lash them eighty. Otherwise their necks have to be struck off because they made *halal* what was forbidden.' So he asked them to repent and they repented, and he struck them eighty eighty."** These two reports indicate that Umar (ra) consulted the *Sahabah* over the extent of the *hadd* of *khamr*. If it were possible to say that Umar (ra) did not consult the *Sahabah* regarding lashing the *hadd* of *khamr* for these drinkers from the group of the people of Ash-Sham, but he rather consulted them over what they did regarding drinking *khamr* and their interpretation of the noble *ayah.*

Thus the consultation was regarding the drinking on the basis of interpretation and not regarding the *hadd* of the drinker. Therefore, Ali (ra) advised him that he asks them to repent, because they made the *haram halal*; if they did not repent then he kills them, and if they repent then he lashes them eighty. It is possible to say this regarding Umar's consultation about the incident of the group of people of Ash-Sham, but the *hadith* of Anas is explicit that the consultation over the measure of the *hadd* of drinking. This is indicated by Abdurrahman bin Awf saying to him, "**The lightest *hadd* is eighty**", and the *ahadith* of striking the *khamr* drinker forty and about forty are proved, and Umar (ra) knew them. So when the consultation regarding the extent of the *hadd* is linked with the *ahadith* of forty and the *ahadith* of about forty, this indicates that he was consulting them over what exceeds forty, ie he was consulting regarding striking the drinker above forty. So Abdurrahman advised him that the lightest *hadd* is eighty. Thus, two matters arise. Firstly, the *Sahabah* understood that it is permitted to increase the *hadd* over forty, and second that the *Sahabah*'s difference of opinion over the text of the *hadd* of *khamr* was only over what exceeds forty and not about forty.

It has also been narrated from *Amir Al-Mu'mineen,* Ali bin Abu Talib (ra) who said, "**I would not perform the *hadd* upon anyone and he dies and feel anything in my soul regarding him except the *khamr* drinker. If he died I would pay his blood money. That is because the Messenger of Allah (saw) did not prescribe it (as) a Sunnah**." Abu Dawud and Ibn Majah said regarding that, "**He did not make it a Sunnah, but it was we who said that**." The meaning of "**he did not make it a Sunnah**" is that he did not determine it nor fix it by his words and statement. In this *hadith*, Ali (ra) says that the Messenger did not determine a specific measure for the *hadd* of *khamr* whereas at the same time Ali (ra) himself says, "**The Prophet (saw) lashed forty, Abu Bakr forty and Umar eighty, and all are Sunnah**." So how does it come about that he says, "**That is because the Messenger of Allah did not prescribe it as a Sunnah**", despite his saying,

"**The Prophet (saw) lashed forty**". This only means he intended by his saying "**he did not prescribe it a Sunnah**" ie he did not determine a *hadd* for it regarding what exceeds forty. So it is as if the discussion is regarding what exceeds forty, since the issue of forty is proved by the *ahadith* that came as explicit texts about that.

Therefore, it is evident that the *Sahabah*'s difference of opinion regarding the extent of the *hadd* was a difference of opinion over what exceeds forty and not regarding forty. Ali's saying that the Messenger did not determine a specific *hadd* for *khamr* and what came of the *ahadith*, "**that the Messenger did not oblige a *hadd* in *khamr***", are only regarding what exceeds forty by the evidence of Ali's saying that the Messenger lashed forty, and the evidence of the *ahadith* stipulating forty. It is evident that when stipulating forty is linked with the Messenger not restricting a *hadd* and the Messenger's saying, "**about forty**", this becomes an evidence that it is permitted to exceed forty. However, it is not proved, from the Messenger of Allah (saw) regarding this increase, a specific *hadd*. It is not proved that it is eighty, or less or more. Rather only an unlimited increase is proved, and nothing else.

While the *ijtihad* of a *Sahabi* is not considered a *Shar'i* evidence, it is nonetheless a *Shari'ah* rule arrived at by correct ijtihad. Beyond the validity of adopting it, because it is a *Shar'i* rule deemed correct by a mujtahid, their saying and opinion is familiarized with. Hence, what exceeds forty is designated by a specific limit, namely eighty lashes. So the *hadd* is forty, and it is permitted for the *Khaleefah* to command lashing him with eighty. The Messenger (saw) lashed forty and the *Sahabah* (ra) lashed eighty; so the *hadd* is forty and eighty. As for the evidence that the *Sahabah* had struck forty and struck eighty, many *ahadith* indicate that. Ahmad and Muslim narrated from Anas, "**that a man who had drunk was brought to the Prophet (saw) and he was lashed with two palm-leaf stalks about forty. He said, 'Abu Bakr did it, but when it was the period of Umar, he consulted the people.' Abdurrahman bin Awf said, 'The lightest *hadd* is eighty', so Umar commanded with it**." Ibn Abi Sheeba extracted from Abu

Abdurrahman As-Salmi from Ali (ra) who said, ''A group of the people of Ash-Sham drunk *khamr* and interpreted (made *ta'weel*) the noble *ayah* so he (meaning Umar) consulted regarding them. I said, 'Ask them to repent and if they repent, lash them eighty. Otherwise their necks have to be struck off because they made *halal* what was forbidden.' So he asked them to repent and they repented, and he struck them eighty." It is narrated from Hudhayl bin Al-Mundhir who said, "**I saw that Al-Waleed was brought to Uthman bin Affan who had prayed subh two *rak'at*. Then he said, 'Did you want me to increase?' So two men testified against him that he had drunk *khamr*. Humran was one of the two (who said) that he drunk *khamr* and the other testified that he saw him vomiting it. Uthman said, 'He did not vomit it except that he drank it', so he said, 'O Ali, stand and lash him.' Ali said, 'Stand, Hasan, and lash him.' Al-Hasan said, 'Let the one in charge of its coolness oversee its heat, as if he felt something against him.' So he said, 'Stand, O Abdullah bin Ja'far, and lash him.' So he lashed him and Ali was counting until he reached forty then he said, 'Stop.' Then he said, 'The Prophet (saw) lashed forty, Abu Bakr forty and Umar eighty. All are Sunnah and this is more preferable to me**.'" It is narrated from *Amir Al-Mu'mineen*, Ali (ra) in the drinking of *khamr* who said, **'Verily when he drinks he becomes intoxicated. When he is intoxicated he raves. And when he raves he slanders. And upon the slanderer is eighty lashes.'** These *ahadith* and *athar (reports from the Sahabah)* are explicit that what the *Sahabah* agreed on was that they would lash the *khamr* drinker forty, and they lashed him eighty, and their practice settled upon these two limits. As for forty, it is proved by the text of the *hadith,* so they lashed forty, acting according to the text of the *hadith* and not by their ijtihad, by the evidence of Ali's saying, "**The Prophet (saw) lashed forty**." As for eighty, they lashed the drinker with it by their ijtihad, due to what they understood of the permissibility of exceeding forty, and because they viewed that the lightest *hadd* is eighty, or because the drinker when intoxicated raves and when he raves he slanders, so they ordained upon him the *hadd* of the slanderer ie the *hadd* of *qadhf* which is eighty. This is what the *Sahabah* proceeded upon, and

what is proved from the Prophet (saw), so the lashing of forty is proved by the *Sunnah*. Lashing eighty is proved from the prominent *Sahabah* of the Messenger of Allah (saw), so the *hadd* of the *khamr* drinker is forty or eighty.

These two limits are the *hadd* of the *khamr* drinker. Nothing other than these two is permitted whatsoever, because it did not come from the Prophet (saw) or the *Sahabah* (ra), that he lashed other than forty and eighty. It is not permitted that it be fifty or ninety or otherwise, because it is a *hadd* and not *ta'zeer*, and because there has been proved two limits regarding it from the Messenger and the *Sahabah,* so it is restricted to adopting one of the two limits and not any other. However, it is permitted for the *Khaleefah* to oblige one of the two ie it is permitted for him to command one of the two compulsorily and make it obligatory. This is because if he obliged eighty, the forty proved by the *Sunnah* has been included in it, and the increase is permitted by the assessment that the *Sahabah* agreed upon, which is eighty. If he obliges forty, it is proved by the *Sunnah*, and what exceeds it is permitted for the Imam, and not obligatory upon him, so there is nothing against him in obliging forty only.

The one who drinks *khamr* is only struck the *hadd* if he knew that consuming in abundance intoxicates; otherwise, there is no *hadd* upon him, because he did not know of its forbiddance. The *hadd* is not obliged until one of two things is proved by the *Shar'*; Confession or evidence. It suffices for one of the two witnesses to testify about drinking of *khamr,* and the other over vomiting, due to what came of the report of Hudhayl. "**So two men testified; Humran was one of the two (who said) that he drunk *khamr* and the other testified that he saw him vomit it."**

**THE *HADD* OF THEFT (*AS-SARIQA*)**

The *hadd* of theft is cutting the hand due to His saying *Ta'ala*, "*The thief, male and female, cut off their hands*" [TMQ Al-Ma'idah,38]. It is also due to what Al-Bukhari narrated from Aisha who said, He (saw) said, "**The hand is cut for one-quarter dinar and beyond that**." It is as

well due to what was narrated from the Prophet (saw) that he said, "**Verily those before you perished because when a noble would steal, they left him but when a weak person stole, they cut his him (hand)**." It is narrated from Aisha, "**that the Prophet (saw) cut the hand of a woman. Aisha said, She would come to me after that and I would raise her need to the Prophet (saw). She repented and made good of her repentance**."

Theft is taking property in a way hidden from its owner or his representative, on condition that it is a *nisab* (minimum amount of property) in order for cutting to take place, that it is taken from a secure location, and that there is no doubt in this property. It is the same whether he took the property at night time or day time, whether he entered into the place via forced opening or not, whether it were a place of residence or a public place, whether it were hidden and concealed or it were open, and whether he carried a weapon or not. Any size of property taken in a hidden way is considered theft. However, there is no cutting over theft except if its *Shari'ah* conditions, for which came authentic texts, are fulfilled. Thus cutting is not obliged except with seven conditions. **Firstly,** That there applies on the taking the definition of theft. The meaning of theft is taking property in a hidden and concealed way. So if he snatched, pilfered, robbed, or betrayed, he is not a thief, nor is he cut over that, due to what Abu Dawud narrated from Jabir from the Prophet (saw) who said, "**There is no cutting upon the betrayer, robber or pilferer (*mukhtalis*)**." There is also no cutting on the one who denies the trust, because his reality is a denier not a thief; so he is a betrayer and not a thief so there is no cutting for the betrayer due to the saying of the Prophet (saw), "**There is no cutting for the betrayer or embezzler**." Pilfering is a type of snatching and robbery, so he hides in the beginning of his pilfering. The denier of the loan is exempted from the betrayer, so he is cut due to the text that came about him. As for the pickpocket, he is cut because the definition of theft applies to him so he takes property in a hidden way.

**The second condition,** The stolen thing is equal to the *nisab*. Some say that cutting is proved regarding the little or the great amount,

according to the generality of the *ayah,* for the word 'male thief' (*sariq*) and 'female thief' (*sariqa*) are generic nouns preceded with '*alif*' and '*lam*' so they are of the words of generality encompassing every thief. It is also due to what was narrated from Abu Hurayrah (ra) that the Prophet (saw) said, "**Allah cursed the thief. He steals the rope (*habl*) so his hand is cut, and he steals an egg (*baydha*) so his hand is cut off**." The egg (*baydha*) is not equivalent to one-quarter dinar and its context here indicates the little not the egg itself ie he is cut no matter how little his theft was. However, the texts stipulated the *nisab*. It is narrated from Aisha who said, "**The Messenger of Allah (saw) would cut the thief's hand for one-quarter dinar and beyond that**." In another narration that the Prophet (saw) said, "**The thief's hand is not cut except for one-quarter dinar and beyond that**." He (saw) also said, "**Cut for one-quarter dinar, and do not cut in what is less than that**." These narrations explicitly indicate the condition of the *nisab,* so they are considered to specify the generality of the *ayah,* like specifying the generality of *zina* by stoning. As for the *hadith* of Abu Hurayrah, it is reconciled with the *hadith* of *nisab* in that the meaning of the '*baydha*' is the helmet of weapons. Al-'Amash said in the narration of the *hadith* of '*baydha*', 'they viewed that it is the iron helmet (*baydhat al-hadeed*). (As for) the rope, they viewed that some of them are equivalent to dirhams.' It was narrated from *Amir Al-Mu'mineen* Ali (ra), 'that he cut the hand of a thief who stole an iron helmet whose price was one-quarter dinar.' Furthermore, it does not indicate of fewness, rather it indicates of defined fewness and he defined it by likening it with the rope and egg. Hence the *nisab* is a condition in cutting, so if it does not reach the *nisab*, there is no cutting.

The *nisab* of cutting is measured by one-quarter dinar of gold, which is equivalent to 1.0625 grams of gold, because the Shari' golden dinar is equivalent to 4.25 grams of gold.

The evidence that this is the *nisab* of theft is what was narrated from Aisha who said, "**The Messenger of Allah (saw) would cut the thief's hand in one-quarter dinar and beyond that**." Al-Bukhari also narrated from Hisham from his father who said, "**Aisha informed me that the**

**thief's hand was not cut at the time of the Messenger (saw) except for the price of a *majann, juhfa* or shield**". The *majan* and *juhfa* are like the shield. And what Al-Bukhari also narrated from Nafi' from Abdullah bin 'Umar (ra) who said, "**The Prophet (saw) cut in a shield (*majann*) whose price was three dirhams**."

The *nisab* of theft is not valued except in gold, due to the Messenger of Allah (saw)'s saying, "**The hand of the thief is not cut for what is less than the price of the shield. It was said to Aisha, 'What is the price of the shield?' She said, 'One-quarter dinar**.'" So the *nisab* was valued in gold, thus its evaluation must be in gold acting according to the text. Gold is made the basis in the valuation and silver is measured with it. Silver used to be evaluated with it in the time of the Messenger (saw), just as paper money nowadays is evaluated with it, since gold remains the basis in valuing the *nisab* of theft. There came *ahadith* valuing one-quarter dinar as three dirhams in the time of the Messenger (saw). The dirham is equivalent to 2.975 grams of silver, on the basis that the gold dinar was equivalent to approximately 12 silver dirhams during the time of the Messenger (saw), whereas nowadays the value of the gold dinar exceeds 60 silver dirhams. Therefore, one-quarter gold dinar nowadays is equivalent to approximately 15 silver dirhams. There came in a narration, "**One-quarter dinar at that time was three dirhams**", and there came in the narration of Ahmad, that "**One-quarter dinar at that time was three dirhams**." Ibn Al-Mundhir extracted "that a thief who stole (*utrujja*) valued as three dirhams calculating of the dinar as twelve (dirhams) was brought to Uthman, so he was cut." All this indicates that the *nisab* is one-quarter dinar, and silver and paper money are evaluated with it, and that the stolen property is valued upon this basis.

**The third condition,** That what is stolen is lawful property (*mal muhtaram*) whose ownership is permitted by the Lawgiver. So it is stipulated that it be property and that this property be lawful ie the Lawgiver permitted its ownership. So if he stole non-property ie that which is not considered property, he is not cut. So if he stole a free person, he is not cut because he is not considered property; and if he stole unlawful property ie whose ownership the Lawgiver did not

permit, he is not cut. Thus there is no cutting in stealing *khamr* or the pig from a Muslim because it is not lawful property, whereas there is cutting in stealing it from a non-Muslim since the Lawgiver permitted for them to own *khamr* and the pig, which are, in relation to them, lawful property. Similarly he is cut for stealing the vessels of *khamr* if they reach the *nisab*, and one is cut for stealing the *mushaf* and books of knowledge if their price reaches the *nisab*.

**The fourth condition;** That he steals it from a safe or secure location (*hirz*) and removes it from there. So if he finds an open gate or an uncovered safe, there is no cutting upon him due to what Al-Bukhari narrated from Amru bin Shuaib from his father from his grandfather who said, "**I heard a man from Muzainah ask the Messenger of Allah (saw) about the (*hareesa*) that is found in the pastures. He said, It is due on them twice its price and an exemplary striking. And there is cutting in what is taken from the resting place of camels near a watering hole, if what is taken from there reaches the price of a shield**." The *hareesa* is the one grazed with a guard over it. Amru bin Shuaib narrated from his father from his grandfather that a man from Muzainah asked the Prophet (saw) about the fruits, so he said, "**What is taken without its calyx/perianth (*akmam*) and is carried, it is due in it its value and its like together with it. And what is in the granary, there is cutting over it if it reaches the price of the shield**." An-Nasai narrated from Amru bin Shuaib from his father from his grandfather who said, "**The Messenger of Allah (saw) was asked about hanging fruit and he said, Whoever among the people of need takes from it by his mouth without taking something with him (*khubna*), there is nothing against him. And whoever leaves taking something, there is on him the fine of double its like and punishment. And whoever steals something after being collected in the barn, and it reaches the price of the shield, then there is cutting for him**." All that indicates that the safe is a condition in cutting. If the grazing animal is seized from the pasture, there is no cutting in its seizure, because it was not seized from the safe of its like; and if it was taken from its resting place near a watering hole, its pen or what is considered to be the safe of its like, then there is cutting. When the fruit is taken from the tree, there

is no cutting; and when it is taken from the place wherein it is preserved, which is the barn, then there is cutting. Similarly there is no cutting in everything if not taken from the safe of its like, and there is cutting in it if taken from the safe of its like, and its price reaches one-quarter gold dinar.

The safe is decided according to the technical term of the people, and not to linguistic or *Shar'* texts. That is because it is a description of reality, and a technical term designated for this reality. So, no reference is made to evidence regarding it, but rather it is referred to what people agreed on, ie the safe is what people agreed on to protect property in it, and it differs according to the properties and countries. Thus, the safe of money is not the same safe of grazing animals, which is different to the safe of clothes and so on. It is stipulated that the thief removes it from its safe, so that cutting occurs, so if he did not remove it from there, there is no cutting. The loan is exempted from the condition of the safe, so the denier of the loan is cut, because Al-Makhzumiyya, for whom Usamah sought to intercede, and because of whom the Messenger (saw) said, "**Were it Fatima daughter of Muhammad, I would cut off her hand**", the Messenger inflicted the *hadd* on her. This is because she

used to borrow then deny what she had borrowed. The Messenger cut her hand due to her denying the loan, so the loan is exempted from the condition of the safe by the text of the *hadith*. It is narrated from Aisha who said, "**A Makhzumiyya woman would borrow objects then deny them, so the Prophet (saw) commanded the cutting of her hand. Her family came to Usamah bin Zaid and spoke to him, so he spoke to the Prophet (saw) about her. The Prophet (saw) said to him, 'O Usamah, let me not see you intercede in a *hadd* of the *hudud* of Allah 'azza wa jalla. Then the Prophet (saw) stood speaking, 'Verily those before you perished because when the noble among them stole, they left him; but when the lowly person among them stole, they cut him. By the One in whose hands is my soul, were it Fatima daughter of Muhammad, I would cut off her hand.' So he cut the hand of Al-Makhzumiyya**."

**The fifth condition;** Doubt must be removed from the stolen property, such as he has a right in it, or that he can take from it. Hence there is no cutting from one's father's property or one's son's property, nor from property in which he has a share, due to the Prophet (saw)'s saying, "**The purest of what a man eats is from his acquisition (*kasb*), and his son is of his acquisition**." Similarly there is no cutting in what is taken from *Bait al-Mal,* due to what ibn Majah narrated with his chain from ibn Abbas that a slave from the slaves of the fifth of the booty stole from the fifth. This was raised to the Prophet (saw) who did not cut him, and he said, "It is **the property of Allah, some of it stole some other**." Ibn Masoud asked Umar (ra) of what is stolen from *Bait al-Mal* and he said, 'Leave him for there is no one but has a right in this property.' It is narrated from Ash-Sh'abi from Ali (ra) that he would say, 'There is no cutting for the one who steals from *Bait al-Mal*.' Similar to *Bait al-Mal* is that which is included in the public property, for there is doubt that he has a right in it whether it were the property itself, like petrol, or it became public property since it became of the secluded property (*hima*) like electricity and water. So if he steals from it, he is not cut, but rather given *ta'zeer,* due to the existence of doubt and because it is like the property of *Bait al-Mal*. Likewise, none of the two spouses is cut if they steal from the other's property, because one of the two spouses disposes in the other's property in his absence, so this is considered a doubt, hence no cutting. In conclusion, cutting does not take place in any property in which there is doubt about taking from it, because the *hudud* are lifted by the doubts.

**The sixth condition;** That the thief be mature, sane and bound by the rules of Muslims, Muslim or *dhimmi*. So if he were a child or insane, there is no cutting due to the Messenger of Allah (saw)'s saying, "**The pen is lifted from three; The one who is sleeping until he awakes, the child until he matures, and the afflicted until he becomes sane**." The pen's lifting from them means they are not legally responsible in the *Shar'*.

**The seventh condition;** That the theft be proved by confession or the reliable evidence. As for confession, it must be linked with the

description ie the thief describes the thing that he stole, due to the possibility that he stole a property where there is no cutting in it while he assumes there is cutting. Ahmad narrated from Abu Umayyah Al-Makhzumi, "**that a thief was brought to the Messenger of Allah (saw) and he made a confession but the object was not found with him. So the Messenger of Allah (saw) said to him, I don't think you stole?' He said, 'Rather I did', twice or thrice. He said, 'So the Messenger of Allah (saw) said, 'Cut him.''**" The Messenger of Allah (saw) wanted to be sure that the stolen property is of the sort of stealing for which there is cutting, and he said to him, 'I don't think you stole?' So when he answered him more than once, he said, 'Cut him.' It is *mandoub* for the judge before whom the thief confesses to instruct of that which cancels the *hadd,* and to exaggerate in corroborating (the theft). One confession suffices just like any confession; as for what came of repeating the confession, it was for corroboration, and it is not a condition in the confession. As for the evidence, it is stipulated that it be two just men or one man and two women ie of the same type of evidences for punishment. Both of the witnesses have to describe the theft in a way that distinguishes it if it were absent ,or to point to it if it were present, and that they should not differ in their testimony in a way that makes them contradictory. So if they differed, such that one testifies that he stole on Thursday and the other on Friday, or one testifies that he stole an automobile and the other testifies that he stole a motorcycle, he is not cut due to the non-completion of the *nisab* of the testimony.

These are the conditions of cutting in theft, so if the theft fulfils these conditions, the thief is cut. It is not enough to cut his hand; rather he must (also) return back the stolen property to its owner. Abu Dawud extracted from Al-Hasan bin Samurah who said, "The Messenger of Allah (saw) said, '**Whoever finds his very property with a man, he is more entitled to it, and the purchaser follows the one who sold it**.'" This is general including the thief, unjust appropriator (*mughtasib*), embezzler (*mukhtalis*) and betrayer. Ahmad extracted from Al-Hasan bin Sumurah who said: The Messenger of Allah (saw) said, "**If an object is stolen from someone, or it is lost from him, then he finds**

**the very thing in the hand of a man, he is more entitled to it, and the buyer regains the price from the seller**." So it is explicit that the stolen property is returned to its owner. If the property has been destroyed or used he guarantees it, so he must pay its price to its owner. If the property has diminished without use like clothes being moth-ridden, automobile parts being damaged or the like, it is obliged to pay compensation. Similar to that is if the property diminished due to usage. If the property is of benefit like a plane or camel, then he can claim its benefit from the thief for the period it remained in his hands, whether he practically benefited from it or not.

**THAT FOR WHICH THERE IS NO CUTTING**

There are properties and situations where theft does not result in cutting, due to the reported *ahadith* that indicate of non-cutting, and because they are not included in that for which there must be cutting. It came from Rafi' bin Khudaij (ra) who said, "The Messenger of Allah (saw) said, '**No cutting in '*thamar*' or '*kathar*'.'" The '*thamar*' is the name of fresh dates hanging upon the trees. As for '*kathar*', it is the young palm tree stolen to be planted in another land; the '*kathar*' is also the *jummar* of the palm tree and its spadix (*tal'*), where the '*jummar*' is the pulp of the palm tree. From Al-Hasan (ra) who said, "The Messenger of Allah (saw) said, '**No cutting in food prepared for eating'**". There is no difference between food prepared by the people of a house to eat and the food prepared by the owner of a restaurant for sale because the *hadith* applies to every food prepared for people to eat it. As for the food which remains as seed or spike of grain, like wheat and its like, it is not prepared for eating; so if it were not in its safe, like wheat in the field, whether harvested or not, there is no cutting in it. Whereas if it were in a safe of its like, then there is cutting due to what was narrated that the Prophet (saw) was asked of the guarded livestock of the mountain and said, "**In it and its like, if its pasture gathered them, there is a fine of its like and exemplary lashing**." The *hadith* of Amru bin Shuaib also said, "'**O Messenger of Allah, the fruit and what is taken from them in their calyx?' He said, 'Whoever takes with his mouth without taking away with him, there**

**is nothing against him. And whoever carries, then upon him is twice its price and exemplary striking. And what is taken from its barns, therein is cutting if what is taken thereof reaches the price of a shield**.'" All this indicates that there is no cutting in gardens, fields, grazing pastures of livestock and the like.

There is also no cutting in the year of famine, which is the period of drought, due to what was narrated from Makhul (ra) that the Prophet (saw) said, "**There is no cutting in a famine**." And Al-Hasan mentioned from a man who said, "I saw two tied up men and meat, so I went with them to Umar (ra). The owner of the meat said, 'we have a ten month old camel and we waited it as we waited the spring. We found these two had slaughhtered it.' Umar (ra) said, 'Will you be satisfied with two (*murbi'*) ten month old camels for your camel? For we do not cut over a cluster of dates/grapes (*'idhq*) cut in nor a year of (*as-sanati*)" ie a year of famine', and that was in the year of famine. The *murbi'* ten month old camel is the pregnant one of ten months, expected to give delivery in spring, and it is the most prized for its owners, who wait for fertile soil for its milk, just as they look after the spring. Subsequently, there is no cutting in the year of famine. Similar to this is the theft of the hungry person who does not find that which feeds him. If he steals to satisfy his hunger, there is no cutting against him, because the Messenger's saying, "There is **no cutting in compelling famine**", applies to him.

Thus the young palm trees taken to be implanted in other land, and likewise all palm seedlings ie everything taken to plant elsewhere, and the piths of palm trees and their spadix; there is no cutting on them due to the Messenger's saying, "**There is no cutting in (*thamar*) or (*kathar*)**." There is nothing to restrict the *kathar* in any amount, so there is no cutting in it absolutely, whether they were taken from their safe or elsewhere. Similarly, there is no cutting in food prepared for eating without any restriction, whether it was taken from its safe or not, due to the absolute form of the *hadith*, "**No cutting in food prepared for eating**." As for the (*thamar*) and wheat , there is no cutting in it if taken from other than the safe, but if he took it from the

safe he is cut, due to the Messenger's saying, "**What is taken from its barn, there is cutting in it**."

**THE EXTENT OF WHAT IS CUT**

The *ayah* of cutting which is His saying *Ta'ala*, "*The thief, male and female, cut off their hands*" [TMQ 5:38] has stipulated cutting of the hand and said "*their hands*". To explain the meaning of the hand it is referred to its linguistic meaning.

The word 'hand' (*yadd*), when designated without restriction in the language, it applies to the palm of the hand (*kaff*) and to the fingertips to the end of the hand ie to the wrist. It is not designated to other than that without a connotation. Thus the *ayah* of *wudu* said, "*…and your hands to the elbows*" [TMQ Al-Ma'idah:6] which clarified the washing of the hands such that it is to the elbows; were the words "*to the elbows*" not mentioned the washing would be to the two wrists ie the washing of the hand would be according to how its linguistic meaning is understood. Thus the thief's hand is cut from the joint of the palm, which is the wrist bone. It was narrated from Abu Bakr As-Siddiq and Umar (ra) that they both said, "If the thief steals, cut his right hand from the wrist bone", and there was no one who disagreed with them among the *Sahabah*. The *ayah* says "*their hands*" and leaves the hand unrestricted without specifying it, indicating that it is permitted to cut the right hand and permitted to cut the left hand without difference. However, the saying of ibn Masoud, 'Cut off their right hands,' and what is proved that Abu Bakr and Umar (ra) said, 'Cut his right hand,' so the cutting is for the right hand upto the '*kaw*" ie the wrist, meaning upto the end of the fingers from the end of the palm, which is the bone between the two wrists and the palm. This is what the name 'hand' is designated to in the language, when left unrestricted without connotation.

When the thief is cut, he is severed (*yuhsam*) due to what was narrated from Abu Hurayrah "**that a thief who had stolen a turban (*shamla*) was brought to the Messenger of Allah (saw). They said, 'O Messenger of Allah, this one has stolen.' The Messenger of Allah (saw) said, 'I don't think that he stole?' The thief said, 'Rather I did, O Messenger of Allah.' So he said, 'Go and cut him, then sever (*hassim*)**

**him**.'" Severing is to boil oil; then, when he is cut, his limb is immersed in the oil to seal its bleeding orifices lest the blood haemorrhages and he dies. Severing is not obligatory just because it is severing, but rather due to a legislative reason (*'illa*) namely his not dying; thus it is permitted to use other than severing to prevent the blood haemorrhaging. So it is allowed to use medical styles instead of severing.

The thief is cut with the easiest (style) that is possible since the objective is punishing him, and not torturing or killing him. If his hand had been cut, such that he has no hand to cut, like where his hand disappeared due to a disease or an aggressor assaulting him, in this case there is no cutting for him, nor is there anything on him. That is because Allah commanded cutting the hand, so if it does not exist, cutting is nullified, and there is no alternative for it. The pregnant woman is not cut during her pregnancy, nor after her delivery until her parturition (*nafas*) terminates, lest it leads to annihilating her and her child. The invalid is not cut in his illness so he is awaited until he recovers lest it annihilates him. If one steals several times before cutting, one cutting is enough. If the thief's hand is cut then he returns to steal after cutting his hand, nothing else of his is cut but he is imprisoned. As for not cutting anything else from him, this is because the *ayah* stipulates cutting his hand; if it has already been cut, the ayah did not stipulate cutting anything else, so the decreed *hadd* has been executed. As for his being imprisoned, this is because no text came with a *hadd* regarding stealing the second time, so it becomes of the category of *ta'zeer*.

**THE *HADD* OF THEFT IS A RIGHT OF ALLAH**

The *hadd* of theft like the rest of the *hudud* is a right of Allah *Ta'ala,* even if there is in it a right for a human. Thus the testimony of the *hisba* judge is accepted regarding it. It is not required that the victim claims his stolen property; nor is the hadd forfeited by the cancellation of the owner's right. Moreover, the *ayah* is general like the *ayah* of the *hadd* of *zina* for Allah *Ta'ala* says, "*The thief, male and female, cut off their hands*" [TMQ Al-Ma'idah:38]. It is also because what obliges the cutting is proved, so it is obliged without claim from the victim, like the

*hadd* of *zina* by the evidence of the *hadith* of Al-Makhzumiyya, since the Messenger (saw) became angry about Usamah's intercession in the *hadd* of theft saying, "'**Verily those before you perished because when the noble among them stole, they left him, but when the lowly person among them stole, they cut him. By the One in whose hands is my soul, were it Fatima daughter of Muhammad, I would cut off her hand**" ie their ruin was because of their negligence of the *hudud*. It is narrated from Abu Hurayrah that the Prophet (saw) said, "**A *hadd* implemented in the earth is better for the people of earth than to have rain for forty days**." It is narrated from ibn Umar from the Prophet (saw) who said, "**Whoever prevented the implementation of any of the hudud of Allah, he is opponent to Allah in His affair**." All these evidences are explicit in non-forfeiting of the *hadd*, and that it is a right of Allah *Ta'ala,* thus it does not require a plaintiff and the testimony of the *hisba* judge is allowed.

However, does the owner of the right waiver of his right before it is raised to the ruler cancel the *hadd* or not? There are those who view canceling the cutting via pardon before raising the matter (with the ruler), and they prove that by what was narrated from Safwan bin Umayyah who said, "**I was asleep in the masjid and on me there was my striped garment which was stolen. We seized the thief and raised him to the Messenger of Allah (saw) and he commanded with his cutting. So I said, 'O Messenger of Allah, for a garment whose price is thirty dirhams, which I donate to him or sell?' He said, 'Were it only before you brought him to me**.'" According to what Abu Dawud extracted from the *hadith* of Amru bin Shuaib from his father from his grandfather that the Messenger of Allah (saw) said, "**Pardon the *hudud* between you, for any hadd that reaches me of it becomes obligatory**." Ad-Daraqutni extracted from the *hadith* of Az-Zubair that the Messenger of Allah (saw) said, "**Intercede in that which does not reach the *wali*. For when it reaches the *wali* and he pardons, may Allah have no pardon on him**." However, on examining the texts we find that cutting is never cancelled, neither before raising to the ruler or afterwards. The evidence for that is the generality of the *ayah* of stealing, and because if the obligation of cutting is proved, it is

obligatory to cut without claim. **Ibn Abd Al-Birr reported that there is the *ijmaa'* that execution (of the *hadd*) is obligatory upon the ruler (*sultan*) if the *hadd* reaches him**; likewise, *Al-Bahr* reported the *ijmaa'* upon that. It is also because the *ahadith* prohibiting the intercession are general including what is before and after the legal claim, and because the *hadd* of theft is the right of Allah without difference of opinion even if it has a human's right; but the right of Allah is not cancelled by waiver. All this proves that waiver does not cancel the hadd of theft. As for the above-mentioned *ahadith*, which are the *hadith* of Safwan, the *hadith* of Amru bin Shuaib and the *hadith* of Az-Zubair, they do not indicate the cancellation of the *hadd*. Rather they only indicate the permissibility of pardon from the property owner. The pardon of the property owner does not mean canceling the *hadd* nor the ruler's pardon. The *hadith* of Safwan says, "**I donate it to him or sell it to him**" so the Messenger said, "**Were it before you brought him to me**" ie if only your pardon was before you brought him to me. This does not mean that if the right's owner forgave him before reaching the ruler via him, then the witness of the *hisba* judge came and claimed that he stole, then his (the *hisba* judge) legal claim would not be accepted and he (the thief) would be forgiven. The *hadith* does not indicate that since the right's owner said to the Messenger when he saw that the thief would be cut because of a garment, 'I donate it to him or I will sell it to him', which is an allusion for seeking pardon for theft and the Messenger answered him that it was necessary that you donate or sell it to him before you came to me ie it was necessary that you pardon before you came to me, whereas after you came to me then no ie your right in pardon was only before it reached the ruler whereas after reaching there is no right for you. This does not indicate the theft pardoned by the owner before it reaches the ruler cancels the *hadd* for the thief, nor indicate that the ruler will not consider it if the case reaches the ruler via other than the way of the owner, but he would rather forgive based on the owner's forgiveness. It does not indicate this in any way whatsoever. Its indication is restricted to the cancellation of the right of the good's owner of pardon after informing about the theft, and the permissibility of his pardon before the

conveyance; nor does it indicate other than that. As for the *hadith* of Amru bin Shuaib, it indicates that pardon is permitted among them thus it said, "**Any hadd that reaches me it becomes obligatory**", it this is general whether it reaches him via the claim of the right's owner or it reaches him via someone else. Likewise the *hadith* of Az-Zubair which

Says, **"Intercede in that which does not reach the *wali"***, ie intercede for each other thus he said, "**For if it reaches the *wali* and he pardons, may Allah have no pardon for him**." This is general whether it reaches the *wali* via the way of the property owner or it reaches via the way of someone else, there is no pardon. So the generality of the *hadith* of Amru bin Shuaib and the *hadith* of Az-Zubair corroborates that the pardon of the property owner before reaching the rule does not cancel the *hadd* in what reaches the ruler; all that is in the matter is that it is valid for property owners to issue pardon from themselves before reaching the ruler.

Thus theft is the right of Allah *Ta'ala* so the *hadd* in it is never cancelled, whether the owner pardons before reaching the ruler or afterwards. So if theft reaches the ruler, he must listen to the legal claim, whether raised by its owner, the witness of the *hisba* judge or the police, because it does not require a plaintiff; and he is allowed to reject accepting the legal claim. If theft is proved, the *hadd* must be executed, because it is not waived via cancellation, nor is it interceded upon nor does pardon enter into it, "**For any hadd that reaches me, it becomes obligatory**", (and), "**For if it reaches the *wali* and he pardons, may Allah have no pardon for him**."

**THE *HADD* OF HIGHWAY ROBBERS (*QUTAA' AT-TURUQ*)**

Fighting between Muslims is of two types; the fighting of rebels and fighting of highway robbers. This is because rebels are of two classes, and there is no third; Either those who rebel based on an interpretation (*ta'weel*) in the *deen* and erred in it, like those who rebel against the Islamic State and whoever is considered like them of the people of heretic tendencies (*ahl al-ahwaa*) which contradict the truth; or a class seeking worldly matters for themselves so they rebel

against a true Imam, and those who behave like them. As for the ones who rebel based on an interpretation in the *deen*, they have a specific rule, they are considered rebels (*bughah*). As for those who rebel seeking worldly matters, if they do not terrorise the highway, seize property or spill blood, they are of the class of rebels, and their rule applies upon them. However, if they exceeded that by terrorizing the highway, seizing the property of those they met or spilling blood, their rule changes from the rule of rebels to the rule of highway robbers.

The origin of the rule for highway robbers is His saying *Ta'ala*, "*Verily the recompense of those who fight Allah and His Messenger and spread mischief (fasad) in the land is that they are killed or crucified or their hands and legs are cut on opposite sides or they are exiled from the land*" [TMQ Al-Ma'idah:33]. This *ayah* was revealed regarding the highway robbers, whether they were Muslims or non-Muslims, because it is general, and there is nothing to specify it to Muslims only. As for His saying afterwards, "*...except those who repent before you have power over them*" [TMQ Al-Ma'idah:34], this does not indicate that it is specific to Muslims, because repentance here is repentance from highway robbery, which can be from Muslims and non-Muslims, so it is general. This is corroborated by what was reported as the cause of the revelation of this *ayah, namely* the incident of the people of Uraynah who apostatised from Islam, killed the shepherds and drove away the camels of *sadaqah*. The Prophet (saw) ordered some people to bring them back and he cut their hands and legs, gouged their eyes and threw them in Al-Harra until they died. Anas said, Allah *Ta'ala* revealed regarding that, "*Verily the recompense of those who fight Allah*" [TMQ Al-Ma'idah:33] the *ayah*. Abu Dawud and An-Nasaa'i have extracted from the *hadith* of Anas, "**that some people attacked the camels of the Messenger of Allah (saw), apostatised from Islam and killed the shepherd of the Messenger of Allah (saw) who was a believer, so he sent some people to chase them and they were seized. He cut their hands and legs and gouged their eyes. He said: So the *ayah* of fighting (*muharaba*) was revealed regarding them**." All this indicates that the *ayah* is general in highway robbers, whether they were Muslims or *kuffar*. What is mentioned in this *ayah* is the

*hadd* of highway robbers. As for the mode of inflicting the *hadd* according to what came in the *ayah*, it was narrated from ibn Abbas who said, "**The Messenger of Allah (saw) covenanted (*wada'*) Abu Barza Al-Aslami, so some people came seeking Islam, but his companions cut off the highway against them. So Jibril descended with the *hadd* regarding them; whoever killed and did not seize property is killed. Whoever seized property without killing, his hand and leg is cut off on opposite sides**." As-Shafi' narrated in his *Musnad* from ibn Abbas regarding highway robbers, 'If they killed and seized property, they are killed and crucified. If they killed and did not seize property, they are killed and not crucified. If they seized property and did not kill, their hands and leg are cut on opposite sides. And if they terrorized the highway but did not seize property, they are exiled from the land.' Accordingly, their punishment varies with the actions that they performed. So if they only seized property, they deserve, for it, cutting the right hand and left leg; the hand is cut from the wrist like the cutting in theft and the leg is cut from the ankle joint. And if they only terrorized the highway, they deserve for it, exile from the land. It is not meant by exile imprisonment, for imprisonment is not exile; rather exile here is deporting from their land to a remote land. If they only killed, they deserve for it killing only. if they killed and seized property, they are killed and crucified. Crucifixion is after killing and not before, because the *ayah* mentioned crucifixion after mentioning killing, so it is better to follow the order mentioned in the *ayah*. It is also because crucifixion before killing is torture and the objective is punishing and not torturing them, and because the objective of crucifixion is restraining others, and this is ensured by crucifixion after killing ie they are killed then crucified before the people's sight, such that they witness them crucified while they are dead. As for the period of their crucifixion, its evaluation is left to the Imam's opinion, but, in any case, they are not left for a period that leads to the body decomposing.

This is the punishment of the highway robbers, so the punishment is according to the sin perpetrated. However, the sin is restricted to these three; killing, seizing property and terrorizing the highway. So if

they do other than that, such as wounding only or breaking hands, legs, ribs or nose ie doing what is less than killing, then there is no *hadd* on them, because the *hadd* is a decreed punishment, so it is according to the text. The text only decreed the punishment on these three, so there is no *hadd* in other than these. The fact that there is no *hadd* for other than these three does not mean, however, that there is no punishment to them; rather it means that there is no punishment as a *hadd* from the *hudud*. Thus it becomes of the category of the *jinaayaat* (crimes) and the rules of *jinaayaat* are applied to them ie the rules of assaulting the body in what is less than life.

However, this is the *hadd* of highway robbers if the reality of highway robbers applies to them ie if they met the conditions of highway robbers. If they do not meet them, then there is no *hadd* on them. The conditions of highway robbers are three;

**Firstly;** It occurs outside the town/city ie in the villages, mountains, coastlines, deserts and the like. Similar to that are the train, plane and car outside the cities, because highway robbery takes place where the presence of help is remote, or where there is no help or aid nearby. As for the towns, aid is nearby, thus the one who does that in the towns is not a highway robber, but rather a purloiner (*mukhtalis*); the purloiner is not a highway robber, so there is no *hadd* on him. However, if they capture a town and kill, seize property, or terrorise the public road during their capture, they are considered highway robbers and the *hadd* of highway robbers is inflicted on them.

**Secondly;** They have with them a lethal weapon like the sword, guns, machine guns, daggers, knives that kill and their likes. If they do not have with them any weapon at all, or they have non lethal weapons such as sticks, whips and the like, then they are not considered highway robbers, so the *hadd* is not inflicted on them.

**Thirdly;** They face the victims openly, and seize property forcefully, and they operate from the same area. If they seize secretly, they are thieves. If they snatch and flee, they are robbers (*muntahibun*). If they come, as one or two people, to the end of a caravan and seize something from it, they do not belong to a power or might, whereas highway robbers make use of a power and might. All of these are not

highway robbers, so the *hadd* of highway robbers is not inflicted on them.

If they fulfill these three conditions, they are highway robbers and the *hadd* is inflicted on them. If any one of these conditions is missing, they are not highway robbers, and there is no *hadd* on them.

If these highway robbers repent before the State gains power over them, the *hadd* of Allah *Ta'ala* on them is cancelled, and they are punished for the rights of humans in terms of the lives, wounds and properties, except if the victims pardon, then a waiver is issued for them due to His saying *Ta'ala*, "*…except those who repent before you have power over them, know that Allah is Oft-Forgiving, Most Merciful*" [TMQ Al-Ma'idah:34]. Whereas if they repent after gaining power over them, nothing of the *hudud* is cancelled from them, according to the meaning of His saying *Ta'ala*, "*…before you have power over them*" [TMQ Al-Ma'idah:34].

**THE *HADD* OF REBELS (*AHL AL-BAGHY*)**

Rebels are those who rebel against the Islamic State, and they have might and power ie they are those who revolt against the State, display arms against it and announce war on it. There is no difference between their rebellion against a just *Khaleefah* or an unjust *Khaleefah*, or whether they relied upon an interpretation in the *deen* or they seek worldly matters for themselves; they are all rebels as long as they display arms against the authority of Islam. It is a duty upon the *Khaleefah* or the one representing him in the *wilayah* to correspond with them and ask them what they are taking vengeance for from the ruler. If they mention an injustice he removes it, and if they claim a specious doubt (*shubha*), he sheds light upon it. If it were obscure for them, such that they believe that what he did is contrary to the truth, while it was not like that, it is a duty upon him to explain to them his evidence and show them the sense of the truth. This is because Islam commands Muslims to display arms in the face of the ruler if they see open disbelief (*kufr bawah*) about which they have

clear proof (*burhan*) from Allah, or he is not implementing the rules of Islam. It is possible that they rebelled due to something of this, responding to the request of the *Shar'*, so it is obligatory upon him to explain the reason of what is unclear to them. If they withdraw from rebellion, he leaves them and it is not permitted for them to continue their rebellion. However, if they do not withdraw, he fights them as an obligation not a fight of war but rather a fight of disciplining (*ta'deeb*). Hence, it is *haram* to fight them in a way that causes general annihilation to them, except for necessity (*dharura*). It is not valid that they be attacked by airplanes, incendiary bombs or heavy cannons, unless there is an extreme necessity required by the styles of disciplinary punishment, and not the styles of war. It is forbidden to kill their children or those who flee from them. Whoever among them leaves the fighting is left, and if they killed anyone they are not killed for him. If one of them is taken captive, he is imprisoned and treated as a sinner and not as a prisoner of war because he is not a prisoner of war. It is not allowed to take anything of their property, because they are citizens whose disciplinary punishment requires following with them the style of fighting, hence fighting against them is neither considered war nor jihad.

The basis for the *hadd* of rebels is the saying of Allah *Subhanahu wa Ta'ala*, "*And if two parties of the believers fight, reconcile between them. If one transgresses against the other, fight the one that rebels until it complies with the command of Allah. Then if it complies, reconcile between them justly and be equitable. Verily Allah loves those who are equitable*" [TMQ Al-Hujurat:9]. This *ayah* considered those rebels as believers, so they did not leave their *iman* by their rebellion. It is explicit in obliging fighting against them and in renouncing fighting against them if they comply with the command of Allah; and that responsibility has been removed from them regarding what they destroyed in their fighting, whether property or lives. His saying, "*Reconcile between them*" [TMQ Al-Hujurat:9] indicated the obligation of corresponding with them before fighting them. This *ayah* proves the *hadd* on the rebels, and explains what it is, namely fighting them until they comply. However, this is after corresponding with

them, and attempting to remove what caused them to rebel in terms of injustice, doubt or misunderstanding or the like.

If the rebels secured themselves in a part of the Islamic lands and appointed judges for them, who judge between people, and appointed rulers who rule the people by implementing the rules of Islam, the verdicts of their judges are executed like the rules of the people of justice (*ahl al-'adl*). The actions of their rulers are treated like the actions of the rulers of the people of justice, as long as they proceeded according to the *Shar'* rules. When the *Khaleefah* overpowers them or they return to the State's realm/domain (*hadheera*), all their rules are executed, since they are Islamic rules by rulers appointed based upon a doubt of rebellion. As long as the Qur'an considers them believers, and as long as it is not correct to deal with them except only with what is necessary to discipline them, all their actions are like the actions of any Muslim of those under obedience to the *Khaleefah* and under the State's authority. Their fighting is a *hadd* like any of the *hudud* of Allah, such as the *hadd* of theft. This does not affect their consideration or the consideration of their rulers, as long as they are Muslims and implement Islam.

**REBELS SEEKING ASSISTANCE FROM DISBELIEVERS (*KUFFAR*)**

It is forbidden for rebels, just as it is forbidden upon all Muslims, to seek assistance of *kuffar* to fight Muslims, whether they were individuals or a State. This is because if it is forbidden for the Muslim to fight the Muslim, then the forbiddance of the Muslim seeking assistance of the *kafir* to fight the Muslim is more grave. If Allah considers the Muslim fighting the Muslim is like *kufr* in terms of the sin's gravity as he (saw) said, "**Insulting the Muslim is iniquity (*fusuq*) and fighting him is *kufr***", then seeking the *kafir*'s assistance against the Muslim is more grave. However, despite its forbiddance, it does not change the rebels from their being believers, nor change the rule of Allah in their regard, so they continue to be considered rebels, and are treated like the rebels even if they sought the assistance of *kuffar*.

As for the *kafir* whose assistance is sought, their rule varies according to their situation. If rebels seek the assistance of the *kafir* of the people of war (*ahl al-harb*) and they give them security or contracted a covenant of protection (*dhimma*) for them, they remain belligerent *kuffar* in Islam's view. There is no value for the *aman* (protection) or dhimma contract given by the rebels. This is because these are specific to the *Khaleefah* who has been given a *shar'ee* pledge, while the rebels do not have such right. Thus the Muslim rebels are fought as a disciplinary punishment, whereas the belligerent *kuffar* with them, are fought as a war and a *shar'ee* jihad, so they are fought without clemency. The situation of war is applied to them, so their captives taken as prisoners of war, and treated as prisoners of war. Thus, their property is taken as booty, and the rules of jihad are applied in their regard, together with all other rules which apply to them. The same rules apply if these *kuffar* were of those given protection (*must'aman*) because if they assist rebels they have broken their covenant and become like the people of war. However, this applies to them if they do that voluntarily ie they assisted the rebels by their choice; whereas if they assisted them under duress, such as in fear of their harm and strength, then they are treated as rebels not as belligerents. If the *kuffar,* from whom the rebels seek assistance, are of the *Ahl Al-Dhimma*, their assistance to them does not change them from being *Ahl Al-Dhimma* whether they assisted them voluntarily or were compelled. This is because they are citizens of the Islamic State, so the rule of rebels applies to them, and they are fought as a matter of disciplinary punishment. It is not true to say they have violated their covenant by their assistance against the Islamic State, because this is considered so if they assisted *kuffar* or a *kafir* state against the Islamic State, for then they would have violated their covenant. As for their assisting Muslims against the Islamic State ie their assistance for rebels, this would not constitute a violation of their covenant because their contract is a contract of *dhimma* for them on the necks of Muslims. So they have a covenant upon the necks of Muslims among whom are the rebels. Thus, by their assistance to Muslims against the Islamic State, they would not have violated their pledge. It is also

because their covenant is not a temporary covenant like for the *must'aman* (those under protection); rather it is a permanent contract. It is not permitted to revoke it due to the fear of treachery from them, so it is not permitted to revoke it due to their assistance of Muslims against Muslims.

Whereas if the *Ahl Al-Dhimmah* alone rebel against the State and fight it, like where they are the rebels and the leaders of the rebellion, then they would have revoked their permanent contract and become of the people of war; so they are fought as a fight of war, and all the rules of war are applied upon them. If their overpowering and annihilation occurs, they are treated like belligerent *kuffar*, so their property is taken booty, their captives are considered prisoners of war, and the Imam can do to them what he does to the people of war.

The rule varies with the *dhimmi*s due to the difference of the reality that they are in. So for every reality, there is a rule that applies to the rule of the *kuffar* in the situations with which Islam came.

**THE *HADD* OF THE APOSTATE (*AL-MURTAD*)**

The apostate (*murtad*) is the one who withdraws from the *deen* of Islam. Whoever apostatises among the men and women, while mature and sane, is invited to Islam thrice, and is restrained (imprisoned); either he reverts (to Islam) or is killed. Allah *Ta'ala* said, "*Whoever among you* apostatise*s from his deen and dies while he is kafir, those are the ones whose deeds have perished in the world and the Hereafter. And those are the inhabitants of the Fire, dwelling therein forever*" INCORRECT REFERENCE [TMQ 2:21]. Al-Bukhari narrated from Ikrimah who said, "**Heretics (*zanadiqah*) were brought to *Amir Al-Mu'mineen* Ali (ra) so he burnt them. That reached ibn Abbas who said, If it were me, I would not have burnt them, due to the Messenger of Allah (saw)'s saying, 'Do not punish with the punishment of Allah', and I would kill them, due to the Messenger of Allah (saw)'s saying, 'Whoever changes his *deen*, kill him.'**" As for killing men, it is clear from the *hadith*; as for killing women, this is due to the generality of the *hadith*, because he said, "**Whoever changes**",

and 'whoever' (*mun*) is of the words of generality. Ad-Daraqutni and Al-Bayhaqi also extracted from Jabir, "**Umm Marwan apostatised and the Prophet (saw) commanded to offer her Islam: Either she repents or she is killed**." As for the invalidity of apostasy from the child and insane, this is because they are not legally responsible, so they are not inflicted by the *hadd* of apostasy due to the Prophet (saw)'s saying, "**The pen is lifted from three: The child until he matures, the one sleeping until he awakes and the insane until he recuperates**." As for his being asked to repent thrice, this is due to the *hadith* of Umm Marwan that the Prophet (saw) commanded that she is asked to repent. And that is what Umar (ra) proceeded upon. From Muhammad bin Abdullah bin Abd Al-Qari who said, "A man came from Abu Musa to Umar, who asked him, 'Is there any news from the West?' The man replied, 'Yes, a man disbelieved after his Islam.' He said, 'What did you do with him?' He said, 'We brought him and struck off his neck.' Umar said, 'If only you imprisoned him three (days) and fed him a loaf of bread daily and asked him to repent. Perhaps he would have repented and returned to the command of Allah? O Allah, I was neither present nor was I pleased when it was conveyed to me.'" Umar and Abu Bakr (ra) followed that approach. Ad-Daraqutni and Al-Bayhaqi extracted, **"that Abu Bakr asked a woman named Umm Qirfah to repent. She disbelieved after her Islam and she did not repent, so he killed her.**" Hence it is established that the Messenger (saw) asked the apostate to repent, and likewise Abu Bakr and Umar (ra) asked for his repentance, thus the apostate is asked to repent before killing him. As for asking him to repent thrice, this is not a restriction but the least wherein an excuse occurs normally. Otherwise, it is allowed to ask for repentance more times, because the objective is to offer him Islam so to return to it, and he is given sufficient time to return. It is narrated that Abu Musa asked the apostate—whom Muadh demanded to be killed (which he was)—to repent for two months before the arrival of Muadh. It was narrated from Umar (ra) that the period of asking to repent is three days; if he repents, his repentance is accepted and he is not killed.

However, the repentance is accepted from the apostate if he does not repeat his apostasy, whereas if he repeats his apostasy, his repentance is not accepted. Rather, he is killed whether he repents or not due to His saying *Ta'ala*, "*Verily those who believe then disbelieve then believe then disbelieve then increase in disbelief, Allah will not forgive them nor guide them the (right) way*" [TMQ An-Nisa':137]. His saying *Ta'ala*, "*Allah will not forgive them*" [TMQ An-Nisa':137] means Allah will not accept their repentance; likewise the State does not accept their repentance. Al-Ashram narrated from Dhubyana bin Amara **"that a man from Bani Sa'd passed by the mosque of Banu Hanifah and they were reciting the poetic verses of Musailama (the false prophet). He returned to Ibn Masoud and mentioned that to him. So he sent for them and they were brought to him. He asked them to repent and they repented. So he let them go except a man among them called ibn An-Nuwaha, and he said, 'I caught you once before. You claim you have repented, but I see that you have returned back', so he killed him."** The one who kills the apostate is the State by a verdict of the ruler, so if one of the Muslims kills him deliberately, there is retaliation from him, just as killing any *kafir* of the State's citizens.

The apostate is the one who disbelieves after his Islam, so everyone who disbelieves after his Islam becomes an apostate. A Muslim disbelieves in four ways; conviction, doubt (*shakk*), saying and action. As for conviction, there are two aspects in it. Firstly, the decisive belief in that which there is a decisive prohibition regarding it, or the decisive command regarding its opposite. This is like believing that Allah has a partner or believing that the Qur'an is not the word of Allah. The second aspect is denying what is known from the *deen* by necessity (*ma'lum min ad-deen bi ad-dharura*) like denying jihad, the forbiddance of drinking *khamr*, cutting the thief's hand and the like. As for doubt, it is the doubt in the beliefs (*'aqaid*) and everything whose evidence is definite (*qat'iyy*). So whoever doubts that Allah is one, or that Muhammad is a Messenger, or the lashing of the *zani*, or something similar, he would become an unbeliever. As for the saying, it means the saying that is not subject to any interpretation (*ta'weel*).

So, whoever says that the Messiah is the son of Allah, and that Muhammad came with Islam from himself or the like, then he has disbelieved without doubt. Whereas the saying that is subject to interpretation does not make its speaker a *kafir,* even if the saying is possibly 99% *kufr* while only 1% *iman.* The presence of *iman* outweighs the 99%, because it is the side of *iman,* since with the existence of the 1% there exists the possibility of interpretation, so he is not considered a *kafir.* He is not counted as *kafir* except if the saying is *kufr* in a decisive way. As for the action, it means the action that is not subject to any interpretation that it is *kufr*. So, whoever prostrates to an idol and prays in a church the prayer of a Christian, he disbelieves and apostatises from Islam, because the Christian's prayer is *kufr* without place for interpretation. So whoever does that, he would have committed *kufr,* with no place for interpretation. As for the action that is subject to interpretation, its doer does not disbelieve. So the one who enters the church does not disbelieve, because it is possible that he entered for watching and it is possible that he enters it for prayer. Similarly, the one who reads the Bible has not disbelieved, because it is possible that he read it to study it in order to refute it, and it is possible he read it believing in it, and so on. So every action that is subject to interpretation does not make its doer a disbeliever, nor is he an apostate, if he does it. Apostasy is proved by what

proves *hudud* other than *zina*, namely the testimony of two trustworthy men or a man and two women ie the *Shar'i* proof, because there came no text specific for it.

**THE APOSTATE'S PROPERTY**

The apostate owns his property and what he earns, before asking for his repentance,. If Islam is offered to him and he refuses and so he is killed, or he dies after his apostasy without killing, one begins by paying his debts, compensation of his *jinaayaat*, maintenance of his wife and those whose maintenance is obliged upon him, because it is not allowed to suspend these rights. If his property is enough for that, and nothing remains of his property, the matter has ended. If anything remains of his property, it is booty (*fai*) put in *Bait al-Mal* together

with the State's properties, the same like the properties of booty. He is treated the same if he migrated to *Dar al-Harb,* such as he flees to one of the *kafir* states. However, if he flees to a *kafir* state, his property is placed under the authority of a trustee (frozen by a decision of the State) and an attempt is made for ask his repentance. If the attempt is unsuccessful and he persists upon apostasy, he is considered to deserve killing and his property becomes booty. The evidence for that is what Abu Bakr (ra) did with the apostates. He fought them, killed them and deemed their blood and properties of no inviolability, due to their apostasy, and thus their properties become booty. The rest of the *Sahabah* agreed with him upon that. Thus were a people of a land to apostatise and apply their rules, they become a land of war (*Dar al-Harb*) regarding taking their properties becoming as booties, taking their captives, enslaving their children and women So it is a duty upon the Imam to fight them, acting according to what Abu Bakr (ra) did, because the *Sahabah* had an *ijmaa'* upon that.

**THE SECOND CATEGORY**

***AL-JINAAYAAT***

*Al-jinaayaat* is the plural of *jinayah*, and linguistically it is an assault on the body, property or honour. In technical terminology (*istilah*), it is an assault on the body by that which obliges retaliation (*qisas*) and property, and it is designated to the punishments that are inflicted for the assault. So *jinaayaat* are designated to the offence itself, and they are designated to the punishment that is inflicted for this offence. It is designated for breaking the tooth, just as it is designated for premeditated killing. It is designated for the wound just as it is designated for the killing that is likely premeditated killing, and so forth. Each one of these matters is called *jinayah (crime)*, and the punishment of each one of them is called *jinayah*.

Killing is one of the greatest *jinaayaat*. Likewise, the punishment for killing is of the greatest *jinaayaat.*. The most prominent rule, known from the *deen* by necessity, is the forbiddance of killing without just cause. The forbiddance of killing is proved by the Book and *Sunnah*. As

for the Book, Allah *Ta'ala* has said, "*Do not kill the soul that Allah made forbidden except for just cause. And whoever is killed unjustly, We have ordained to his relative authority (to demand retaliation)*" [TMQ Al-Isra':33]. And He *Ta'ala* said, "*And it is not for a believer to kill a believer except by mistake*" [TMQ An-Nisa':92]. And He *Ta'ala* said, "*And whoever kills a believer intentionally, his recompense is the Hellfire eternally (dwelling) therein and the wrath and curse of Allah are upon him. And He has prepared a great punishment for him*" [TMQ An-Nisa':93]. These *ayat* are definite in proof and of definite meaning (*qat'iyy thubut qat'iyy dalalah*) in forbidding killing, so it is of the definite rules. As for the *Sunnah*, it is narrated from ibn Masoud who said,The Messenger of Allah (saw) said, "**The blood of a Muslim man who testifies '*La ilaha illa Allah, Muhammad Rasul-Allah*' is not allowed except in one of three; the married (*thayyib*) adulterer (*zani*), the soul for the soul, and the one who leaves his *deen and* separates himself from the community**." It is narrated from Aisha from the Prophet (saw) who said, "**It is not allowed to kill the Muslim except for one of three characteristics: A *muhsan* adulterer who is stoned, a man who kills a Muslim intentionally, and a man who leaves Islam, thus he fights Allah *'azza wa jalla* and His Messenger**." These are explicit texts regarding the forbiddance of killing, "**The blood of a Muslim man is not allowed**", (and) "**It is not allowed to kill the Muslim**"; so killing the Muslim is *haram* and its forbiddance is of what is known from the *deen* by necessity.

**ASPECTS OF KILLING**

Killing has four aspects; Premeditated (*'amad*), quasi-premeditated (*shibh ul-'amad*), mistaken (*khat'a*) and what is put on equal footing with the mistaken. As for the premeditated, it is clear from His saying *Ta'ala*, "*Whoever kills a believer intentionally*" [TMQ An-Nisa':93]. As for the quasi-premeditated, this is clear from what Abdullah bin Amru bin Al-Aas narrated that the Messenger of Allah (saw) said, "**Verily the *diyyah* of the quasi-premeditated, that which is by the whip, is one hundred camels, among them are forty that are pregnant**." As for the mistaken, it is clear in His saying *Ta'ala*, "*And it is not for a believer to*

*kill a believer except by mistake*" [TMQ An-Nisa':92]. As for what is put on equal footing with the mistaken, it is a part of the mistaken, save that the definition of mistaken killing does not apply to it. So its reality is not the reality of the mistaken, because the mistaken is associated with the will of the action as an action, but is mistaken regarding the part (of the body) on which the action occurs. Whereas, that which is treated on equal footing with the mistaken is not associated with the will of the action at all, so the action occurs from him without his will, thus its reality is other than the reality of the mistaken.

**INTENTIONAL KILLING**

Premeditated killing is that a person strikes a person with something whose like mostly kills, or a person does an action to a person that mostly kills. Included in this are three types;

**Firstly;** He strikes with a lethal weapon like the sword, knife, revolver, grenade and similar things that kill in most cases. Or he strikes him with a heavy weight whose like kills in most cases, whether that was of iron like an anvil, hammer, heavy stone or large piece of wood or the like. This is considered of intentional killing, and the rules of intentional killing apply to it.

**The second type;** He strikes him with a non-lethal weapon which does not kill in most cases, but it is linked with something else which makes it of what kills predominantly like the stick that has in it a heavy iron or big nails were driven in its heavy head, or he repeatedly strikes in a way that kills predominantly. These and the like are considered killing of the type of intentional killing. Anas has narrated "**that a Jew crushed the head of a slave girl between two stones. It was asked, 'Who did this to you? Is it this person, or this person?' When the Jew was named she nodded with her head. He was brought, and he confessed. The Prophet (saw) commanded regarding him, and his head was crushed with two stones**" ie killed him. In the narration of Muslim, it is said, "**He killed her with a stone, so they came with her to the Prophet (saw) and she was barely alive**."

**The third type;** That he does to him an action which annihilates him, in most cases such as tying his neck with a rope and strangling him, or throwing him from a high place like the top of a mountain, large

building, train or a fast car, or throws him in the sea that drowns him, or throws him in a fire, or places him with and a lion or leopard in an enclosed area like a pen, or imprisons him in a place and refuses him food and drink for a period that remains until he dies. Or he feeds him poison or something that kills, or to be a cause in what kills him predominantly, such as compelling a man to kill another and then he killed him, so he becomes the killer (together) with the immediate killer and so forth. Every action that kills in most cases is considered intentional killing, due to what Abu Dawud narrated in the report of the Jewish woman who brought the Prophet (saw) a poisoned sheep regarding which Abu Salamah said, "**Bishr bin Al-Bara died so the Prophet (saw) commanded regarding her and she was killed**."

**THE PUNISHMENT OF PREMEDITATED KILLING**

The rule of premeditated killing—in all its types—is that the killer is killed ie retaliation is obliged in intentional killing, which is killing the killer as a recompense for his perpetrating of intentional killing, if the relatives of the one killed do not pardon. If they pardon, the *diyyah* is delivered to his family except if they give charity (renounce it). The evidence for that is His saying *Ta'ala*, "*Whoever is killed unjustly, We ordained for his relative authority, so let him not exceed the bounds in killing*" [TMQ A-Isra':33] and His saying *Ta'ala*, "*Retaliation has been prescribed for you in killing*" [TMQ Al-Baqarah:178] and His saying *Ta'ala*, "*Verily there is life for you in retaliation*" [TMQ Al-Baqarah:179]. Retaliation is treating equally in reprisal ie killing the killer. Al-Bukhari narrated from Abu Hurayrah that the Prophet (saw) said, "**Whoever has someone killed has a choice between two views, Either he ransoms or he kills**." Abu Dawud narrated from Abu Shuraikh Al-Khuzai'yy who said, I heard the Messenger of Allah (saw) saying, "**Whoever is afflicted with blood or (*khabal*)—and (*khabal*) is the wound—he has a choice of one of three. Either he retaliates or he takes the blood money (*'aql*) or he pardons. If he wishes for a fourth, prevent him**." He (saw) said, "**The premeditated (killing) is retaliation, unless the killed person's relative pardons**." Abu Dawud extracted from the Prophet (saw) that he said, "**Whoever kills**

**intentionally, retaliation is made against him**." And ibn Majah extracted that the Prophet (saw0 said, "**Whoever kills intentionally retaliation is made against him. And whoever comes in between him and that, there is upon him the curse of Allah, the angels and all people; neither a barter nor a ransom will be accepted from him**." At-Tirmidhi narrated from Amru bin Shuaib from his father from his grandfather that the Messenger of Allah (saw) said, "**Whoever kills intentionally is handed over to the killed person's relatives. If they wish, they kill him and if they wish they take the *diyyah*, which is thirty (*hiqqah*), thirty (*jadha'ah*) and forty (*khalifah*). Hiqqah is the camel in its fourth year, jadha'ah is the camel in its fifth year, and khalifah is the pregnant camel. And whatever they agreed upon, it is theirs**." These evidences are explicit in indication that the rule of the intentional killer is retaliation ie the killer is killed or
the relative takes the *diyyah* or forgives.

**RETALIATION (*AL-QAWAD*)**

Retaliation is killing the intentional killer. He (as) said, '**Whoever kills intentionally, retaliation is made against him**." So whoever kills a person deliberately he is killed for him, due to the explicit *hadith*. Retaliation is made against the murderer, even if the deceased were of amputated limbs or mentally retarded, and the killer healthy and physically intact, or vice versa. Likewise, if they differed in knowledge and nobility, wealth and poverty, health and illness, strength and weakness, old age and youth, being of authority or ordinary, etc. There is no difference between his being free or a slave, man or woman, Muslim or non-Muslim. So the life is for a life, irrespective of all considerations due to the saying of the Messenger of Allah (saw) in the above-mentioned *hadith* of ibn Masoud, "**Life is for life (an-*nafsu bi-nafsi*)**", which is general. This is enough for indication, because it is a saheeh *hadith* and a clear text on the subject.

The word 'life/soul' (*nafs*) is a generic noun including all lives, so the man is killed for the man, the man for the woman, the free for the free, the free for the slave, the man for the *kafir*, and the *kafir* for the Muslim, without any difference between a life and a life. As for killing the man for the woman, it is proved by the text of the *hadith*. Malik

extracted from the *hadith* of Amru bin Hazm that the Prophet (saw) wrote a letter to the people of Yemen, "**The male is killed for the female**." Al-Bukhari narrated from Anas "**that a Jew crushed the head of a slave girl between two stones. It was asked, 'Who did this to you? Is it this person, or this person?' When the Jew was named, she nodded with her head. He was brought, and he confessed. The Prophet (saw) commanded regarding him and his head was crushed with two stones**." These two *hadith* are explicit evidence that the man is killed for the woman. in addition to the Messenger (saw)'s saying, "**The male is killed for the female**." As for killing the free for the slave, Muslim and Al-Bukhari narrated from Al-Hasan bin Samurah that the Messenger (saw) said, "**Whoever kills his slave, we will kill him and whoever mutilates his slave, we will mutilate him**". So if the master is killed for his slave, then somebody other than the master is killed for a slave, by greater reasoning.

As for the Muslim killing the *kafir*, there is differentiation between the belligerent disbeliever (*kafir harbi*) who has not been given protection (*aman*) either generally with his state nor specific to him, and the *kafir dhimmi* and the *kafir must'aman*. As for the *kafir* harbi who has not been given a security, a Muslim or *dhimmi* is not killed for him, whether he were an effective belligerent as were the *Quraysh* with the Messenger (saw), or not an effective belligerent as were the remaining tribes before the Messenger declared war against them. This is because there is no difference of opinion regarding the effective belligerent, in that the Muslim kills him wherever he finds him, and his blood is shed with impunity. As for the one who is not an effective belligerent, if he is not a covenanted person (*mu'ahid*) then if the Muslim kills him he is not killed for him; rather against him is only half the *diyyah* of the Muslim, due to what Amru bin Shuaib narrated from his father from his grandfather that the Prophet (saw) said, "**The blood money (*'aql*) of the *kafir* is half the blood money of the Muslim**", because we did not announce war against him and the situation of actual war is not ongoing between us and him. So the Muslim is not killed for a belligerent *kafir* other than the *mu'ahid* whatsoever, with the evidence that the Messenger (saw) had stated in his *hadith* that

the Muslim is not killed for the *kafir* and the *kafir mu'ahid* is not killed for the *kafir*. Ahmad has narrated from Ali (ra) from the Prophet (saw) who said, "**The believer is not killed for the *kafir,* nor the one with a covenant during his covenant**." It was authentically reported from him (saw) that he said, "**The Muslim is not killed for a *kafir*, nor the one with a covenant during his covenant**." The meaning of the *hadith* is that the believer is not killed for the belligerent *kafir* nor is the *kafir mu'ahid* killed for the belligerent *kafir* ie the Muslim is not killed for the *kafir* nor the *kafir* with a covenant is killed for a *kafir* ie a belligerent *kafir* because the *mu'ahid*, whether a *must'aman* or *dhimmi*, is a *kafir*. So this is an evidence that the Muslim and *mu'ahid* are not killed for the belligerent *kafir*.

As for the non-belligerent *kafir*, either he is a *dhimmi* or *must'aman*. If he is a *kafir dhimmi*, he is treated like the Muslim in protecting his blood, property and honour, and his blood is inviolable for the Muslims like the Muslim's blood. Al-Bukhari narrated from Abdullah bin Amru from the Prophet (saw) who said, "**Whoever kills a *mu'ahid* will not smell the fragrance of Paradise even though its fragrance is found from a distance of forty years**." At-Tirmidhi narrated in his *Saheeh* from Abu Hurayrah that the Prophet (saw) said, "**Whoever kills a *mu'ahid* soul, which has the *dhimma* of Allah and the *dhimma* of His Messenger, he has *broken*) the *dhimma* of Allah and will not smell the fragrance of Paradise even though its fragrance is found for the distance of forty autumns**." These two *hadith* indicate the forbiddance of killing the *mu'ahid* and *dhimmi*, and include the severe threat for the killing of the *mu'ahid* and *dhimmi,* due to its indication that the killer abides forever in the Hellfire and Paradise is forbidden for him. Al-Bayhaqi extracted from the *hadith* of Abdurrahman Al-Bailimani "**that the Messenger of Allah (saw) killed a Muslim for a *mu'ahid* and said, 'I am the most noble of those who fulfill their *dhimmah*'**." This *hadith* indicates that whoever kills a *mu'ahid* is killed for him, and that the Muslim is killed for a *kafir dhimmi*. At-Tabarani extracted **"that a man of the Muslims who had killed a man of the *Ahl Al-Dhimmah* was brought to Ali and the evidence was established against him so he commanded with his killing. His**

**brother came saying, 'I have pardoned.' He said, 'Perhaps they threatened you, terrified you and censured you?' He said, 'No, but killing him will not return my brother to me. They offered me and I accepted.' He said, 'You know better. Whoever has our *dhimma*, his blood is like our blood and his *diyyah* is like our *diyyah*.'"** This report , even if it is the action and saying of a *Sahabi* thus it is not suitable as an evidence, however it is taken into consideration during the deduction with the *hadith*. So it is taken into consideration in deducing the *hadith* that the Muslim is killed for a *mu'ahid*. As for what At-Tirmidhi narrated from Abu Juhaifah who said, "**I said to Ali, 'Do you have anything of the revelation which is not in the Qur'an?' He said, 'No, by the One who cleaves the grain and cures the living creature , except an understanding that Allah gives a man in the Qur'an and what is in this page.' I said, 'And what is in this page?' He said, 'The blood money, freeing the prisoner of war and that the believer is not killed for the *kafir* nor the one with a covenant during his covenant**.'" And also what Ahmad and Abu Dawud narrated from Amru bin Shuaib from his father from his grandfather that the Prophet (saw) said, "**The believer is not killed for the *kafir* nor the one with a covenant during his covenant**"; the unrestricted hadith is referred to the restricted. So the *hadith* has mentioned in its first half an unrestricted statement namely, "**The believer is not killed for the *kafir***", and mentioned in the second half a restricted statement. The statement indicated the restriction via the necessary indication (*dalalat ul-iqtidha*) namely, "**Nor the one with a covenant during his covenant**" ie nor is the *kafir* with a covenant killed for a *kafir*. The word '*kafir*' was omitted from the second half due to sufficiency, since it was mentioned in the first half. So his saying 'the *kafir* is not killed for a *kafir*' and describing the first *kafir* that he is 'one with a covenant' requires that the second *kafir* be a belligerent (*harbi*) *kafir* ie requires that the second *kafir* be restricted that he is belligerent. Hence the *kafir* in the first part, which is the unrestricted, is referred to the *kafir* in the second half which is the restricted. Thus the *hadith*'s meaning becomes, 'The Muslim is not killed for a belligerent *kafir* nor a *mu'ahid* for a belligerent *kafir*.' Thus these two *hadith* are not suitable as evidence for not killing the

Muslim for a *dhimmi*. As for the *kafir must'aman*, he is treated like the *dhimmi* in deeming his blood being inviolable and the Muslim is killed for him. That is because the *hadith* of Abdullah bin Amru mentioned the *mu'ahid* and the *hadith* of Al-Bailimani mentioned the *mu'ahid*, and the *must'aman* is a *mu'ahid*. Just as the *dhimmi* is considered a *mu'ahid*, the *must'aman* is considered a *mu'ahid,* whether there was a security for him alone or a security is with his state, as a general security for its citizens. All are treated like the *dhimmi* as long as he is in our homeland (*Dar*). This is because by having security he protected his life, property and honour, so it is forbidden for Muslims to kill him, without difference of opinion over that among the people of Islam. He *Ta'ala* said, "*If one of the polytheists seeks your protection, grant him protection until he hears the word of Allah then escort him to his place of safety*" [TMQ At-Tauba:6]. So if a Muslim kills him, he is killed for him like the *dhimmi* equally. The fact that the rule of killing him by mistake is the same as the rule of the Muslim, as it came in the Qur'an, corroborates that. He *Ta'ala* said, "*And if he were of a people with whom you have a treaty, the diyyah is paid to his family and freeing a believing slave.*" [TMQ 4:92] This indicates that killing him deliberately is like killing the Muslim deliberately.

As for the *ayah*, "*The free man for the free man, slave for the slave, female for the female*" [TMQ Al-Baqarah:178], its wording indicates that when the free man kills a free man he is killed for him, when the slave kills a slave he is killed for him, and when the female kills a female she is killed for her; there is no indication in the *ayah*'s wording except that. However, the opposite meaning (*mafhum ul-mukhalafa*) in the *ayah* indicates that when the free man kills the slave he is not killed for him, and when the male kills the female he is not killed for her. The *mafhum ul-mukhalafa* is the *mafhum ul-mukhalafa* of the attribute (*sifa*) not the *mafhum ul-mukhalafa* of the title (*laqab*), and it is acted upon it if there came no other text to annul it. However, if there came a text to annul it, the *mafhum ul-mukhalafa* is suspended and not acted upon. The text that annuls the *mafhum ul-mukhalafa* does not abrogate the *mafhum ul-mukhalafa* because it only abrogates the wording (*mantouq*); as for the *mafhum ul-mukhalafa*, it

is suspended by the text. For example His saying *Ta'ala*, "*Do not force your slave girls into prostitution if they desire chastity*" [TMQ An-Nur:33] whose *mafhum ul-mukhalafa* indicates that, if they do not desire chastity, it is permitted to force them into prostitution. However, this *mafhum ul-mukhalafa* is annulled and suspended by a text that indicates of its opposite, which is His saying *Ta'ala*, "*Do not approach zina. Verily it is an indecency (fahisha) and evil way*" [TMQ Al-Isra:32] and His saying *Ta'ala*, "*The female zani and male zani, lash each of them one hundred lashes*" [TMQ An_Nur:2]. This text suspends the *mafhum ul-mukhalafa* of the *ayah*, "*Do not force your slave girls into prostitution if they desire chastity*" [TMQ An-Nur:33]. Another example is His saying *Ta'ala*, "*Do not devour riba doubled and multiplied*" [TMQ Al-'Imran:130], where the *mafhum al-mukhalafa* of the *ayah* indicates that (one can) devour riba if it is not doubled and multiplied. However this *mafhum al-mukhalafa* is annulled, suspended and not acted upon, because there is a text that indicates the opposite, which is His saying *Ta'ala*, "*Allah permitted trade and forbade riba*" [TMQ Al-Baqarah:275] and His saying *Ta'ala*, "*If you repent, for you is the principal sums of your property*" [TMQ Al-Baqarah:279]. The *ayah*, "*The free man for the free man*" is of this type, for Allah *Ta'ala* says, "*Retaliation is prescribed for you in intentional killing. The free man for the free man, slave for the slave, female for the female*" [TMQ Al-Baqarah:178]. So its *mafhum al-mukhalafa* is that the free man is not killed for the slave, and the male is not killed for the female. However this *mafhum al-mukhalafa* is annulled, suspended and not acted upon, because there is a text that indicates the opposite, which is his (saw) saying in the *hadith* of Samurah, "**Whoever kills his slave, we will kill him**", and his (as) saying in his letter to the people of Yemen, "**The male is killed for the female**." So there remains in the *ayah* its mantouq only; the deduction will then be with the saheeh a*hadith* that indicate that the free man is killed for the slave, and the male killed for the female.

Thus, the *hadith* of ibn Masoud, "**The life is for a life**" is general in all lives that are killed, so their killer is killed. Retaliation is thus a human

being for a human being, a life for a life; so whoever kills a life is killed for it, male or female, free man or slave, Muslim or *kafir*.

These texts regarding killing the life for a life are general and applicable to every life, except what the text excludes, so it is excluded. On reviewing the texts, it is clear that there is no text excludes the killing of the premeditated killer, except one text that excludes the mother and father, if anyone of them kills their son or daughter, no matter how far down the progeny. So the father is not killed for his children, nor the grandfather killed for his grandchildren, no matter how far their degree descends with the son's children and daughter's children, being equal in that. The evidence for that is what Umar bin Al-Khattab and ibn Abbas narrated that the Messenger of Allah (saw) said, "**The parent is not killed for his child**", and this *hadith* is explicit, and the *hadith* is considered of the *mashur hadith*. As for killing the child for his father and mother, there is no saheeh text to exclude him, so he is killed according to the generality of the texts. So if the child kills his father, no matter how far up, he is killed for him; and if the child kills his mother, no matter how far up, he is killed for her, due to the generality of His saying, "*Retaliation is prescribed for you in killing*" [TMQ Al-Baqarah:178] and the because there is no saheeh text to specify the ayah in other than the son, like that which specified it in other than the father. As for what was narrated from Suraqah from the Prophet (saw) who said, "**The father is not retaliated against for his son, nor the son for his father**", this *hadith* did not come in the famous books of the *Sunan*, nor do the *fuqaha* think it has an origin. As long as the *hadith*'s authority has not been established, it is not correct to deduce with it, so it does not specify the generality. Moreover, it was narrated from Suraqah himself "**that he (saw) would retaliate the son for the father, but not the father for the son**" (At-Tirmidhi narrated it). This contradicts the first *hadith* and their dates are not known so it is impossible to claim abrogation nor to reconcile them, because they are in complete contradiction with each other.. Thus, they are two repelling *hadith*, so they must be discarded and act upon the clear explicit texts.

**QUASI-DELIBERATE KILLING (*AL-QATL SHIBH UL-'AMAD*) (isn't this the same as manslaughter?)**

Quasi-deliberate killing is when one kills with a non-lethal weapon, either due to a hostile intention against someone, or the intention of disciplining, but he exceeds the limit, like striking with the whip, stick, small stone, strike with the fist, hand or anything that does not usually kill. This is because it is not linked with something that makes it predominantly kill. So it is quasi-deliberate killing, if he kills with these things and the like, because he intended striking less than killing. It is called 'deliberate mistake' (*'amadu al-khat'a*) and 'mistaken intention' (*khat'a ul-amad*), for the intention and accident gathered together in it, so he intended the action and erred in the action. This is due to what Abu Hurayrah narrated and said, "**Two women of Hudhayl fought. One of them struck the other with a stone and killed her and what was in her womb. So the Prophet (saw) adjudged that the *diyyah* of her foetus is a male slave or girl (*waleeda*), and he adjudged with the *diyyah* of the woman upon her relatives (*'aqilah*)**." So he obliged her *diyyah* upon her *'aqilah* and the *'aqilah* does not bear responsibility for the intentional killing.

**PUNISHMENT OF QUASI-DELIBERATE KILLING**

As for the rule of quasi-deliberate killing, it is the heavy *diyyah*, which is one hundred camels, forty of them pregnant. That is due to what Ahmad and Abu Dawud narrated from Amru bin Shuaib from his father from his grandfather that the Prophet (saw) said, "**The blood money of quasi-deliberate killing is like intentional (killing), and its doer is not killed. That is the Satan violently agitates between the people, so there will be blood without malice and without bearing weapons**." Al-Bukhari narrated from Abdullah bin Amru that the Messenger of Allah (saw) said, "**Verily the one killed in quasi-deliberate killing is the one killed by the whip and stick. Therein is one hundred camels, forty of them pregnant**."

**ACCIDENTAL HOMICIDE (*AL-QATL UL-KHAT'A*)**

Accidental homicide is of two kinds. Firstly; one does an action without intending to hit the killed person, but it hits and kills him, like where

he shoots at prey and strikes a human being and kills him. Or he does an action which leads to the killing of a person he did not intend to kill or strike by this action, whether the action he did is of what is permitted for him to do or not. That is like his reversing the car backwards and killing a person whom he did not see; or he intended killing one person and he hits another person and kills him; this is of the type of accidental homicide. The second kind of accidental (homicide) is, One kills in a *kufr* country for example Europe or America a person he thinks is a belligerent *kafir,* but this person has embraced Islam and hid his Islam until he can escape to the land of Islam; this killing is of the type of accidental homicide.

These two types of killing represent accidental homicide, and all that is included under them is accidental homicide. If it were of the first type of accidental (homicide), which is that he does an action that he does not intend to hit the killed person, in this case a *diyyah* of one hundred camels is obliged in it. An expiation (*kaffara*) of freeing a slave is also obliged in it; if he cannot find a slave, then he fasts two consecutive months. If it were of the second type, namely killing a *kafir* in the land of the enemy, then it appears after that that he is a Muslim hiding his Islam, in this case only the expiation is obliged and the *diyyah* is not obliged. The evidence for that is His saying *Ta'ala*, "*And it is not for a believer to kill a believer except by mistake and whoever kills a believer by mistake, then freeing a slave and diyyah delivered to his family except if they give it in charity (by forgiving). And if he were of a people who are enemies to you and he is a believer then freeing a believing slave. And if he were of a people with whom you have a treaty (meethaaq), then a diyyah is delivered to his people and freeing a believing slave. And whoever does not find, then the fast of two consecutive months (as a) repentance to Allah. And Allah is All-Knowing ('aleem) All-Wise (hakeem)*" [TMQAn-Nisa':92]. In this *ayah*, Allah *Ta'ala* said, "*Whoever kills a believer accidentally, then freeing a believing slave and a diyyah is delivered to his family unless they give charity*" [TMQ An-Nisa':92] which indicates that the punishment of accidental homicide is *diyyah* and expiation together. There is no difference in that between the one killed being a Muslim or *kafir* with

a covenant by the evidence of His saying *Ta'ala* in the same *ayah*, "*And if he were of a people with whom you have a treaty (meethaaq), then diyyah delivered to his people and freeing a believing slave. And whoever does not find, then the fast of two consecutive months*" [TMQ 4:92]. And also in this *ayah*, Allah *Ta'ala* said, "*And if he were of a people enemy to you and he is a believer, then freeing a believing slave*" [TMQ An-Nisa':92]. So He (swt) said regarding one of a people enemy to Muslims and he is a believer, freeing a believing slave only without mentioning other than that, even though He mentioned the *diyyah* together with freeing the slave in the *ayah* before it and after it, which indicates that the rule in this case is the expiation only ie freeing the believing slave or fasting two consecutive months. This is the evidence of the second case so all of the *ayah* is an evidence for accidental homicide.

**WHAT IS CONSIDERED A MISTAKE (again, I think ACCIDENT is a better word)**

What is considered as a mistake is that which happens from a person without his will and leads to killing a person. That is like when one turns over while sleeping upon a person thus killing him, or if he falls upon him thus killing him, or if he stumbles while walking, on a person thus killing him, or plays with a weapon which slips away from him without his will thereby killing a person, or something breaks in his car so it slips from the drive thus killing a person or any similar actions. These are treated as mistake, even if that occurred against the will of the doer. That is because it resembles the first type of accidental homicide. The car reversing backwards is an accidental homicide, which resembles something breaking in the car and it slipping away from him, so it is accidental homicide. Likewise, hitting a man when shooting at prey is accidental homicide, similarly his playing with a weapon and killing a man is accidental homicide. The resemblance between the two is clear, except that the mistake occurred in the action carried by the will of the doer, but not for what occurred of the action. Whereas in what is treated as a mistake, there is no will, whatsoever, from the doer, neither, for what occurred from the action or otherwise. Thus one does not say that it is accidental (homicide) but

rather it is treated as a mistake. So, its rule is the same rule of the first division of accidental (homicide) ie the *diyyah* of one hundred camels is obliged in it and expiation is obliged in it, which is freeing the slave, and if he does not find one, then fasting two consecutive months.

**THE EVIDENCE (*BAYYINA*) OF KILLING**

Killing is proven by confession and proof (*bayyina*). As for proving by confession, this is due to what Al-Bukhari narrated from Anas bin Malik regarding the Jew who confessed to crushing a slave girl's head and was punished by the Prophet SAW. As for proof, this is due to what Al-Bukhari narrated from Bashir bin Yasar, "**it was claimed that a man of the Ansar, called Sahl bin Abu Hatma, informed that a group of his people departed to Khaybar and spread in it, and they found one of them killed. They said to those amongst whom he was found, 'You killed our companion.' They said, 'We did not kill nor do we know the killer.' So they rushed to the Prophet (saw) and said, 'O Messenger of Allah (saw), we rushed to Khaybar and we found one of us killed.' He said,'Al-Kubr, Al-kubr (it is great, it is great)'. Do you bring an evidence about who killed him?' They said, 'We have no evidence.' He said, 'So they swear.' They said, 'We are not pleased with the oaths of the Jews.' The Messenger of Allah (saw) disliked to squander his blood uselessly, so he paid him as blood money one hundred camels of *sadaqah***." It is narrated from Rafi bin Khudaij who said, "**A man of the Ansar was found dead one morning in khaybar, so his relative rushed to the Prophet (saw) and mentioned that to him. He said, 'Do you have two witnesses to testify about the death of your companion?' They said, 'O Messenger of Allah, there was none of the Muslims, and they are Jews who dare to do greater than this.' He said, 'Then choose from them fifty and make them swear.' Then the Prophet (saw) paid his blood money from himself**." It is narrated from Amru bin Shuaib from his father from his grandfather, "**that ibn Mukhayyesa Al-Asghar was found dead one morning in Khaybar. The Prophet (saw) said, Establish two witnesses upon who killed him so that I give him to you. He said, 'O Messenger of Allah, where would I get two witnesses?' He rather was found killed one**

**morning at their doors. He said, 'Swear fifty oaths, so he said: O Messenger of Allah,**
**how do I swear over what I do not know?' The Messenger of Allah (saw) said, 'Let them swear fifty oaths.' He said 'O Messenger of Allah, how do you ask them to swear and they are Jews?' So the Messenger of Allah divided his *diyyah* between them and he assisted them with one half of it**." In these three a*hadith*, the Messenger requested two witnesses as evidence for the claim of killing. In the first *hadith*, he said to him, "**Did you bring evidence about who killed him?**" In the second *hadith* he said, "**Do you have two witnesses to testify about who killed your companion?**" In the third *hadith* he said, "**Establish two witnesses over who killed him**." This is explicit that to prove killing, there must be evidence; and it is explicit that the evidence is two witnesses. This means that killing is proved by two witnesses, so if two witnesses exist, killing is proved and if not, then no. There is no difference of opinion in that. The difference of opinion is regarding the two witnesses; Are they two men, and this testimony is specific to *hudud* and punishment, or are they two witnesses like the remaining testimonies, two men or one men and two women? Al-Awzai' says that retaliation is like property, so the testimony of two men is enough or one man and two women, deducing that from His saying *Ta'ala*, "*Call to witness two witnesses of your men. If there be not two men, then a man and two women*" [TMQ Al-Baqarah:282]. The generality of persons applies to all situations ie it is general, thus exclusion from it requires an evidence. There is no specifying text, so the text remains applicable to the generality of cases. The *madhab* of the *Shafi'ites* is that the testimony in the punishment by Allah *Ta'ala*, like the *hadd* of drinking and highway robbery or (related to the rights of) human like retaliation is two men. They deduced that due to what Malik narrated from Az-Zuhri who said, "**The Sunnah passed that the testimony of women is not permitted in *hudud*, nor marriage and divorce**". It was compared to these three what is like them.

The truth is that the testimony of killing came with a text of two witnesses, "**Do you have two witnesses**" "**Establish two witnesses**",

so nothing else is allowed in it, due to the explicitness of the text, thus there must be two witnesses.

As for the witnesses being men, there is nothing to indicate that, because the word 'witness' (*shahid*) that came in the a*hadith* means the man and woman, and it came regarding the *hudud* and retaliation as general verified upon the man and woman. So He *Ta'ala* said, "*Why did they not bring four witnesses for it?*" [TMQ An-Nur:13] The word 'witnesses' (*shuhadaa'*) includes the man and woman. He (saw) said, "**Four or otherwise there is the *hadd* upon your back**", and the word four includes the man and woman. That which indicates the permissibility of the testimony of women in the *hudud* and *jinaayaat* is that Allah *Ta'ala* said, "*Call to witness two witnesses*" [TMQ Al-Baqarah:282] then He said, "*If there be no two men, then a man and two witnesses*" [TMQ 2:282]. It is narrated from Abdullah bin Umar from the Messenger of Allah (saw) who said in the *hadith* of testimony, "**The testimony of two women is equal to the testimony of a man**." And from Abu Said Al-Khudri that the Messenger of Allah (saw) said in the *hadith* of testimony, "**Is the testimony of a woman not half the testimony of a man? We said, Yes indeed, O Messenger of Allah**." These evidences are general in every legal case, and there is nothing that specifies it in non-*hudud* and non-*jinaayaat*, so it remains general. As for the Messenger's saying, "**Two witnesses**", "**Establish two witnesses**", this is similar to His saying *Ta'ala*, "*Call to witness two witnesses*" [TMQ Al-Baqarah:282] and His saying, "*If there be no two men, then a man and two women*" [TMQ Al-Baqarah:282], which came following the mentioning of two witnesses, which is general for any two witnesses. Likewise, the *hadith*, even though it did not mention it explicitly, but it is understood from the *ayah*. Thus the evidence of testimony covers the *hudud* and *jinaayaat*. So the evidence for killing is two witnesses, men or a man and two women. However, it is understood from the clear text of the Messenger that nothing is accepted in the matter except the complete testimony, which is two men or a man and two women or four women. If the testimony was less than being complete, there is a doubt and the Messenger (saw) said, "**Avert the *hudud* due to doubts**" so it is not accepted in the

*hudud*. The Messenger's saying regarding the evidence of killing, "**Two witnesses**", is, likewise, a clear text upon the completion of the testimony, so it is also not accepted in *jinaayaat* except the complete testimony. Thus, the testimony of killing is the complete testimony that came in the texts ie in the a*hadith*.

There remains the *hadith* of Malik from Az-Zuhri that they used as an evidence that the testimony of killing must be two men, namely, "**The Sunnah from the Messenger of Allah (saw) and the *Khaleefah* after him passed that the testimony of women is not permitted in *hudud*, marriage and divorce**." Were this *hadith saheeh*, it would be a specification of the general evidences, and the opinion of the Shafi'ites would be correct. However the chain of this hadith is broken due to the existence of Ismail bin Abbas as a reporter, who is weak and is not used as a proof. As-Shawkani said in '*Nayl Al-Awtar*', "Ibn Abi Sheeba extracted the mentioned saying of Az-Zuhri with a chain that includes Al-Hajjaj bin Al-Arta'a, who is weak together with the *hadith* being *mursal,* whose like does not establish an proof. So it is not suitable to specify the Qur'an's generality, regarding what is included within its text, not to speak of what is not included in it, but rather enclosed to it through analogy." This also indicates the weakness of the *hadith* via the second way by which it is narrated. As long as the *hadith* is weak, then it is incorrect to deduce with it, hence deducing with this *hadith* is invalid, and the evidences remain to be general so the testimony of women is accepted in killing.

**THE KILLER'S ACCOMPLICE AND HELPER**

There is no doubt that a group is killed for killing one, because the text of the a*hadith* that came with the killer's punishment encompass the one (person) and encompass the group. The Messenger (saw)'s saying, "**Whoever has one of his (relatives) killed has the better of two options ; either he ransoms, or he kills**", includes whether one killed him or a group killed him. **And Umar asked Ali about killing a group due to killing one (person), and he said to him, 'Do you see that if a group stole a property, would you cut them all?' He said, 'Assuredly'. He said, Killing is likewise**. So if a group or more associated in killing,

they are all punished and all are killed, even if the one killed was one (person).

As for the meaning of associating in killing, it depends upon his role in the killing. So if he associates in striking the one killed, he is definitely an accomplice in the killing. Whereas, if he does not associate in striking, it is examined; If he were a facilitator in the killing, such as he held the one killed so the killer struck him, or he brought him for the killer and the like, he is not considered a partner, but rather a helper so he is not killed but imprisoned. Ad-Daraqutni extracted from ibn Umar from the Prophet (saw) who said, "**If a man holds a man and another kills him, the one who killed is killed and the one who held is imprisoned**", which is explicit that the assistant and helper are not killed, but rather imprisoned. However, they are imprisoned a long time up to thirty years and Ali bin Abu Talib (ra) views imprisoning him until he dies. Ash-Shafi' narrated from Ali (ra) that he judged regarding a man who intentionally killed a man, and another who held him, and said, "The killer is killed and the other imprisoned in prison until he dies." So everyone who is not a partner is imprisoned but not killed. As for the partner, he is definitely killed, whatever his role was in the association. Hence the direct partner, the inciting partner,the ringleader and the conspiring partner; all of these are considered partners, because they undertook the killing action. So they are considered partners, whether they associated by striking or associated in directing the killing, because it is one of the actions of killing. So all of those whose action is considered association in killing are killed, like the direct partner. However, the facilitator is not considered a partner, neither in a direct or indirect way, especially that the *hadith* is an evidence for that.

**HOW TO KILL THE KILLER**

The correct view is that it is permitted to kill the killer by anything that is deemed the best way of killing. Killing by the sword is not a condition, so it is permitted to kill by the sword, hanging, shooting and otherwise. There is only one condition, namely, to do the best killing cleanly ie that the killing should be by the best tool that facilitates

death. Muslim has extracted from Shaddad bin Aws that the Prophet (saw) said, "**When you kill, kill well and when you slaughter, slaughter well**." What is requested is the best killing, and there is no authentic text to state a specific tool for killing. As for the *hadith*, "**No retaliation except by the sword**", all the ways by which it was narrated are weak, until it is said it is a rejected (*munkar*) *hadith*, so it is invalid to use it as an evidence.

As for when the killing has to be completed, it is preferred not to hurry in executing the rule immediately. Rather, it is delayed for the period till there is no hope regarding the pardon of the people of the blood, because they are given a choice between killing and *diyyah* and pardon so they be given a period to choose therein particularly as the Lawgiver encouraged pardon. Allah *Ta'ala* says, "*Whoever is pardoned something by his brother*" [TMQ Al-Baqarah:178] ie the one whose brother in the *deen* of the heirs of the blood, forgives him something of their right in retaliation, even if one when they are numerous, it is obligatory to follow that, and retaliation is cancelled. The Messenger (saw) said, "**Whoever has one of his relations killed is in the best of two choices; Either he pardons or he kills**." And from Anas who said, "**No matter with retaliation was raised to the Messenger of Allah (saw) except that he commanded with pardon**." In order that there be scope for the people of the blood to pardon or take the *diyyah*, it is better to delay executing the rule for a period, where the matter ends in a specific situation, of killing, taking *diyyah* or pardon.

As for those who are given a choice between killing, *diyyah* and pardon, they are the heirs of the one killed. So those who are entitled for the blood, they are all the heirs of the one killed, without difference between male and female, reason (*sabab*) and relation (*nasab*), so retaliation is for all of them. It is not a right for the *'aqilah*, because intentional killing obliges *diyyah* in the killer's property, and it is not obliged upon the *'aqilah*, and because the *diyyah* of the one killed is for his heirs and not for the *'aqilah*. Hence pardon is for the heirs; so whoever one of them forgives then retaliation is cancelled.

**BLOOD MONEY (*DIYYAH*)**

*Diyyah* is two types; The harsh *diyyah* which is one hundred camels, forty of them being pregnant, and it is taken in case of intentional killing, if the blood relative (‘aql) chooses ie the blood money, and it is also the punishment for quasi-deliberate killing.

As for the second type, it is the *diyyah* without harshness namely one hundred camels, and it is taken in case of wrong homicide and what is treated likewise. The evidence for that is what An-Nasaa’i narrated that Amru bin Hazm narrated in his letter that the Messenger of Allah (saw) wrote to the people of Yemen, "**In regard of the believing life there is one hundred camels**." And from Abu Bakr bin Muhammad bin Amru bin Hazm from his father from his grandfather that the Messenger of Allah (saw) wrote a letter to the people of Yemen, and there was in the letter, "**Whoever randomly killed a believer with an evidence, there is retaliation, unless he satisfies the relatives of the killed (person) amicably. And for the life there is the *diyyah* of one hundred camels**." And from Abdullah bin Amru that the Messenger of Allah (saw) said, "**In regards of the one killed (in) accidental homicide, the one killed by the whip or stick, there is one hundred camels, forty of which must be pregnant**." This is in terms of camels, and it is not taken from other livestock, because the text came stipulating it, so it is not taken from cattle, sheep/goats nor other than these two due to the absence of evidence from the Messenger (saw) about that. As for what was narrated from Ataa’ from Jabir who said, "**The Messenger of Allah (saw) obliged upon the people of camels, one hundred camels, and upon the people of cattle, two hundred cattle, and upon the people of sheep/goats, two thousand sheep and upon the people of clothes, two hundred clothes**", it is a weak *hadith*. It is of the narration of Muhammad bin Ishaq from him and he is weak when he mentions the transmission (sanad), for he was known to make deception. He also mentioned Ataa’ from Jabir bin Abdullah, and he did not mention the name of the one who narrated it to him from Ataa’, so it is a narration from an unknown person, thus it is rejected and not valid to deduce with. As for what was narrated from Amru bin Shuaib from his father from his grandfather who said, "**The Messenger of Allah (saw) judged that the one whose blood money is in cattle,**

**upon people of cattle is two hundred cattle. And whoever is in sheep, two thousand sheep**", likewise it is weak for in its chain is Muhammad bin Rashid Ad-Dimashqi Al-Makhuli, and more than one has spoken against him, so his narration is not accepted; it is rejected and it is not deduced with. Hence, the saheeh texts mentioned camels only, and nothing else was mentioned. What came in weak a*hadith* has no value, is not used as evidence nor deduced with upon other than camels. So *diyyah* is specified to be in camels only if it is in grazing livestock. As for what came from Umar (ra) that he, "**obliged *diyyah* upon the people of cattle (as) two hundred cattle**", Umar's action is not proof, so it is not an evidence. However, the *hadith* that is narrated from Umar (ra) is narrated via the way of ibn Lahyi'a, so its transmission is weak because of ibn Lahyi'a, thus it is an unrecognized *athar* and is rejected. As for what Abu Dawud extracted from Amru bin Shuaib from his father from his grandfather that Umar (ra) stood speaking and said, **"Verily camels have become expensive so estimate for the people of gold, one thousand dinars and upon the people of silver, twelve thousand, and for the people of cattle, two hundred cattle, and for the people of sheep, two thousand sheep, and for the people of clothes, two hundred clothes"**, it is not suitable as an evidence, because it is Umar's saying and *Sahabi*'s saying is not a *Shari'ah* evidence. It is also *ijtihad* from Umar (ra) in estimating the value of camels and not numeration of the origins/bases of the *diyyah*, thus it mentioned therein, **"Verily camels have become expensive so value upon the people of gold…"** Thus, it is valuing of camels ie it is *ijtihad* of Umar (ra) in valuing camels, and the ijtihad of the *Sahabah* is not of the *Shari'ah* evidences.

The specification of camels in *diyyah* makes them one of the bases of the *diyyah*, so its alternative is not taken nor is it valued. Thus, cattle, sheep, clothes and others are not taken. Camels are taken and nothing else. Nor are they valued in money because there came no text to value it with, and because it is an original *diyyah* and not an alternative.

This is in regards to the *diyyah* of grazing livestock, namely the *diyyah* of camels. As for the *diyyah* of money, its amount in gold is one

thousand dinars, and in silver, twelve thousand dirhams. As for the evidence for the *diyyah* of gold, this is what An-Nasaa'i narrated from Abu Bakr bin Muhammad bin Amru bin Hazm from his father from his grandfather, "**And upon the people of gold there is one thousand dinars**." As for the evidence of the *diyyah* of silver, it is what was narrated from Ikrimah from ibn Abbas "**that a man killed, so the Prophet (saw) ordained his *diyyah* as twelve thousand**", ie twelve thousand dirhams. So the *diyyah* of the murdered is paid from money ie either one thousand dinars or twelve thousand dirhams. It is not paid in any other form of remuneration, because the text specified gold and silver, and it is obligatory to be restricted to the text.

The *Shari'ah* dinar equals the weight of 4.25 golden grams, which is the weight of the *Shari'ah* mithqal. The *Shari'ah* dirham equals the weight of 2.975 silver grams.

Thus the diyyah of the murdered by gold is equal to the weight of 4250 grams of gold, while the shar'i dirham is equal to the weight of 35700 grams of silver.

The diyyah is paid in paper money equivalent to 1000 dinar of gold, which is equal to the price of 4250 grams of gold; and for the 12000 dirham of silver, what is equivalent of the price of 35700 grams of silver.

The *diyyah* of the free man, slave, male, female, Muslim and *dhimmi* is the same without difference between them. The *diyyah* of the male and female, free man and slave, are the same; this is due to the Messenger of Allah (saw)'s saying, "**Muslims are equal in their blood**" and his (as) saying, "**In regards of the believing life, there is (a diyyah of) one hundred camels**", and his (as) saying, "**The blood money (*'aql*) of quasi-deliberate killing is harsh**", and his saying, "**Verily the one killed by quasi-deliberate killing, the one killed by a whip or stick, therein is one hundred camels**." And due to what came in the Prophet's letter to the people of Yemen, "**And in regards of the life, the *diyyah* is of one hundred camels**." All these evidences are general, including the male and female, freeman and slave so his saying, "**Their blood is equal**", indicates that their *diyyah* is equal; so the freeman's is

not different from the slave's *diyyah*, nor is the male's *diyyah* different from the female's *diyyah*. And his saying, "**quasi-deliberate**" and "**one killed accidentally**" is general including all quasi-deliberate killing and everyone killed accidentally. Thus the female, male, freeman and slave are included therein. And his saying, "**In regards of the believing life**", and his saying, "**In regards of the life**", included under the word 'life' (*nafs*) is the man, woman, freeman and slave. These evidences are explicit that the *diyyah* is the same for the man and woman, freeman and slave, without preference between them. As for what was narrated from Muadh bin Jabal from the Prophet (saw) who said, "**The woman's *diyyah* is half the man's *diyyah***", it is a weak *hadith*, and so it is not used as evidence. Al-Bayhaqi said about this *hadith*, "Its chain does not prove such hadeeth." As for what Al-Bayhaqi extracted from Ali (ra) who said, "**The woman's *diyyah* is half the man's *diyyah* in (*kall*)**", it is a *Sahabi*'s saying and it is not considered a *Shari'ah* evidence. Moreover, it is of the narration of Ibrahim An-Nakhai', and it has interruption (*inqita'*) so it is rejected. Hence those who say the woman's *diyyah* is half of the man's *diyyah* do not find for themselves an authenticated evidence, so there does not remain except the general evidence which indicates generality, and it is enough for the Messenger's saying, "**In regards of the believing life**", and his saying, "**In regards of the life**", as evidence that the man's *diyyah* is equal to the woman's *diyyah*. As for those who say that the value of the *diyyah* of the male and female slave, no matter what it reaches, should not reach the free man's entire *diyyah* (, they have no evidence whatsoever whether a *saheeh* or weak *hadith*, nor a *saheeh* or faulty narration. All that they depended on is the *ijmaa'* of the people of knowledge (*ahl al-'ilm*), saying, "The people of knowledge have an *ijmaa'*." It is known that *ijmaa'* of the people of knowledge has no value, nor is it considered a *Shari'ah* evidence. How can the *ijmaa'* of the people of knowledge stand before the general evidences, particularly before his (saw) saying, "**In regards of the believing life, there is one hundred camels**" and his (saw) saying, "**In regards of the life the *diyyah* is of one hundred camels**"? Does anyone in the world deny that both the male and female slave are a soul (*nafs*)? Thus the

view of those who use as a proof the *ijmaa'* of the people of knowledge is rejected, and the *diyyah* of the male and female slave is the same as the *diyyah* of the freeman and woman.

As for the *dhimmi*'s *diyyah* being like the Muslim's *diyyah*, this is due to the generality of the *ahadith* that came as evidence for the *diyyah*, particularly his (saw) saying, "**In regards of the life the *diyyah* is one hundred camels**." The word 'life' (*nafs*) includes the *kafir* and the Muslim. However, evidences came regarding shedding the belligerent *kafir*'s blood with impunity, so they have excluded the belligerent *kafir* only, while the *dhimmi* remains included in its generality. There are explicit texts from the Book and *Sunnah* indicating the *dhimmi*'s *diyyah* is like the Muslim's *diyyah*. As for the Qur'an, Allah *Ta'ala* has said, "*And if he were of a people with whom you have a treaty then a diyyah delivered to his people*" [TMQ An-Nisa':92]. The way of deducing with this *ayah* is that it mentions the *diyyah* absolutely without restriction, "*then a diyyah delivered*", and the absoluteness of this *diyyah* infers that it is the well-known *diyyah*, which is the Muslim's *diyyah*. As for the *Sunnah*, At-Tirmidhi has extracted from ibn Abbas, "**The Prophet (saw) paid the blood money of the two '*Amir*i men whom Amru bin Umayyah Ad-Dhumairi killed, and they had a covenant from the Prophet (saw) that Amru did not know of, as the Muslims' *diyyah***." Al-Bayhaqi extracted from Az-Zuhri "**the *diyyah* of Jews and Christians in the time of the Prophet (saw) was like the Muslim's *diyyah*, and in the time of Abu Bakr, Umar and Uthman. When it was (the time of) Mu'awiya, he gave the people of the one killed half of it and the other half was put in the *Bait al-Mal*. He said, "...then Umar bin Abdulaziz judged with one half and discarded what Mu'awiya would decree**." It is narrated from Ikrimah from ibn Abbas who said, "**The Messenger of Allah (saw) made the *diyyah* of the two '*Amir*i men the same *diyyah* of the free Muslim, and they had a covenant**." Al-Bayhaqi extracted "**that he (saw) made the *diyyah* of those with a covenant like the Muslim's *diyyah***." It is narrated from Amru bin Shuaib from his father from his grandfather that the Prophet (saw) said, "**The *diyyah* of the Jews and Christians is like the Muslim's *diyyah***." All these *ahadith* are explicit that the *dhimmi*'s and the

*mu'ahid*'s (covenanted) *diyyah* is the equal to the Muslim's *diyyah*, so they corroborate the generality of the evidence. Hence the *dhimmi*'s and *mu'ahid*'s *diyyah* is like the Muslim's *diyyah* without difference between them. As for the evidence that mentioned the *kafir*'s *diyyah* is half the Muslim's *diyyah*, they do not contradict these *ahadith*, because those evidences are with respect to the *kafir* and these are in respect to the *mu'ahid* and *dhimmi*, so there is no contradiction between them. It is narrated from Amru bin Shuaib from his father from his grandfather that the Prophet (saw) said, "**The *kafir*'s blood money (*'aql*) is half of the Muslim's *diyyah***." Ahmad extracted that the Messenger of Allah (saw) "**judged that the blood money of the People of the two Books is half of the Muslims' blood money, and they are the Jews and Christians**." Ubadah bin As-Samit narrated that the Prophet (saw) said, "**The *diyyah* of the Jew and Christian is four thousand, for both**." It is narrated from Amru bin Shuaib from his father from his grandfather from the Prophet (saw) who judged "**that the *diyyah* of the person of the Book's blood money is half of the Muslim's blood money**." All these *ahadith* indicate that the *kafir*'s *diyyah* is half of the Muslims *diyyah*, but they do not contradict the other *ahadith* that made the *dhimmi*'s and *mu'ahid*'s *diyyah* like the Muslim's *diyyah*, because they say, "**The *kafir*'s blood money**", "**Blood money of the People of the two Books**", "***Diyyah* of the Jew and Christian**", "**Blood money of the person of the Book**", which are general including the belligerent (*harbi*), *mu'ahid* and *dhimmi*. When there came other a*hadith* indicating that the *mu'ahid*'s and *dhimmi*'s *diyyah* is like the Muslim's *diyyah*, they specified them; so the meaning of '***kafir***', '**People of the two Books**", "**Jew and Christian**", "**person of the Book**" is the belligerent) by the evidence of the other a*hadith* excluding the *mu'ahid* and *dhimmi*. So the a*hadith* that made the *mu'ahid*'s and *dhimmi*'s *diyyah* like the Muslim's *diyyah* specified the other general a*hadith*. Hence the general a*hadith* are not evidence that the *mu'ahid*'s and *dhimmi*'s *diyyah* is half of the *mu'ahid*'s *diyyah*, but rather evidence for the belligerent only.

One can say here that we have been commanded to kill the belligerent *kafir* wherever we meet him, and his blood is shed without impunity, so how can there be upon the Muslim half his blood money? The answer to this is that the belligerent *kafir* whom we are commanded to kill wherever we find him and whose blood is shed with impunity is the *kafir* against whom we declared war ie the one with whom there is a situation of active war as was the situation between the Quraysh and the Messenger (saw). As for the belligerent *kafir* with whom we are not in a situation of active war, we are not commanded to kill him wherever we meet him. Our command to fight him, as a State or group, is stipulated by calling the group to Islam first, then demanding the *jizyah* if they refuse and, third, we fight them. That is like the situation of tribes other than Quraish with the Messenger (saw); there was no active warfare, but they were belligerent *kuffar*. Muslims were not fighting these tribes wherever they found them during the war with Quraish and before the revelation of *Surah At-Tawbah*, but rather Muslims used to mix with them. So these belligerent *kuffar* with whom there was no declared war are meant by the a*hadith* of the *kafir*'s *diyyah* being half of the Muslim's *diyyah*. For example if war exists between us and the English, we are commanded to kill them wherever we find them and their blood is spilt with impunity. However, if war does not exist between us and Germany, for example, and there is no treaty between us, then we do not kill the German wherever we find them due to the absence of a situation of real war between us. Thus their blood would not be shed with impunity, so if the Muslim kills a *kafir* among them, then upon the Muslim is half *diyyah* but he is not killed for the *kafir*. Therefore the a*hadith* of the *kafir*'s *diyyah* being half of the Muslim's *diyyah* is in regards of the *kafir* with whom there is no situation of real war between us, since at that case his blood is shed with impunity. Thus, the a*hadith* that the *mu'ahid*'s *diyyah* is like the Muslim's *diyyah* is specific to the *dhimmi* and *must'amin* (under covenant). Accordingly, it is evidence that the *dhimmi*'s and *mu'ahid*'s *diyyah* is the same as the Muslim's *diyyah*.

**UPON WHOM IS IT OBLIGED TO PAY THE *DIYYAH*?**

As for the one who pays the *diyyah*, there is elaboration; As for the *diyyah* of intentional killing, it is taken from the killer's property, and not upon the *'aqilah* (blood relatives) due to what Amru bin Al-Ahwas narrated that he witnessed the farewell Hajj with the Messenger of Allah (saw) and the Messenger of Allah (saw) said, "**The criminal/offender does not commit a crime except upon his own soul. The father does not commit a crime against his son, and nor the child upon the father**." It is narrated from Al-Khashkhash Al-Anbari who said, "**I came to the Prophet (saw) and with me was my son. He said, 'This is your son?' I replied, 'Yes.' He said, 'He does not commit a crime brought upon you, nor is what you commit brought against him**.'" It is also narrated from ibn Masoud who said, "**The man is not punished for the guilt of his father nor for the guilt of his brother**." All these evidences are proof that in intentional killing, the killer's *'aqilah* does not bear the *diyyah* of the one killed. Similar to that is the one confessing to killing, so his *'aqilah* does not bear his *diyyah*. It is narrated from Ubadah bin As-Samit that the Messenger of Allah (saw) said, "**Do not place upon the *'aqilah* anything of the *diyyah* of the confessor**." It is also narrated from Umar (ra), "The *'aqilah* does not bear the blood money of the intentional (killing), the slave, reconciliation (*sulh*) or confession." It is narrated from ibn Abbas who said, "The *'aqilah* does not bear intentional (killing), reconciliation, confession or what the slave commits as a crime." Homicide other than that, which is the quasi-deliberate killing, accidental and what is treated as acidental killing, the *diyyah* is upon the *'aqilah*. As for quasi-deliberate killing, Abu Hurayrah has narrated saying, "**Two women of Hudhayl fought. One of them struck the other with a stone and killed her and what was in her womb. The Prophet (saw) judged that the *diyyah* of her foetus is a male or female slave, and judged the woman's *diyyah* upon her *'aqilah***." It is known that killing with the stone is of quasi-deliberate killing, because killing with a stone is killing with that which does not kill in most cases, ie a non-lethal weapon. As for accidental homicide and what is treated as a mistake, it has been narrated from Jabir, "**that two women from Hudhayl fought.**

**One killed the other and each of them had a husband and children. The Messenger of Allah (saw) ordained the *diyyah* of the killed woman upon the *'aqilah* of the killer and absolved her husband and children. He said, 'The *'aqilah* of the killed woman said, 'Her inheritance is ours.' The Messenger of Allah (saw) said, 'No, her inheritance is for her husband and her children**.'" It is authenticated from the Prophet (saw), "**that he judged with the *diyyah* of accidental (homicide) upon the *'aqilah***." These texts are proof that the *diyyah* of the accidental homicide is upon the *'aqilah*, and similar to the accidental (homicide) is what is treated as a mistake, because it is a type of accidental (homicide).

The *'aqilah* are the paternal relations/agnates (*'asabaat*) only. As for others, of the mother's brothers and the remaining maternal relatives (*al-arham*), spouse and everyone other than the paternal relations, are not of the *'aqilah*. The *'aqilah* are the paternal relations (*'asaba*) of the man, namely his brothers, paternal uncles and their children no matter how far they descend. As for his father and his sons, they are not of the *'aqilah*. The reason for that is that the *'aqilah* are the agnates who do not inherit except the remainder of the inheritance. Amru bin Shuaib narrated from his father from his grandfather who said, The Messenger of Allah (saw) judged "**that the blood money of the woman is distributed between her agnates, those who do not inherit anything from her except what is excess of her heirs. And if she is killed, her blood money is distributed between her heirs**." The father and children get original inheritance (*aslan*) and not as agnates (*ta'asubban*). The Messenger (saw) also ordained the *diyyah* upon the *'aqilah* without ordaining anything of it upon the child. It is narrated from Jabir, "**that two women from Hudhayl fought. One killed the other and each of them had a husband and children. The Messenger of Allah (saw) ordained the *diyyah* of the killed woman upon the *'aqilah* of the killer and absolved her husband and children. The *'aqilah* of the killed woman said, 'Her inheritance is ours.' The Messenger of Allah (saw) said, 'No, her inheritance is for her husband and her children**.'" This is explicit that the Messenger did not make the child among the *'aqilah*, and his father is like him, since he is

of the (same) meaning. It is also because his child's property is like his property, and because the Prophet (saw) says, "**You and your property are for your father**." Hence the father and son are not included in the *'aqilah* in regards to the *diyyah*. The *'aqilah* are the agnates apart from the son and father. Whoever has no *'aqilah* takes from the *Bait al-Mal*, due to what came in the *hadith* of Sahl bin Abu Hashma about the one killed in Khaybar, "**So the Prophet (saw) paid his blood money from himself**", and in the *hadith* of Amru bin Shuaib, "**So he paid his blood money from the camels of sadaqah**." The *'aqilah* does not guarantee the *diyyah*, for this is contradictory to His saying *Ta'ala*, "*No soul bears the burden (wizr) of another*" [TMQ Al-A'raf:164]. However, this *ayah* is general but the *ahadith*, of making the *'aqilah* guarantee the *diyyah*, restricted it so it became excluded from the *ayah*'s generality. The restriction of the Book by the *Sunnah* is allowed and occurs without doubt.

In conclusion, the *diyyah* of quasi-deliberate killing, accidental homicide and killing that is treated as a mistake is obliged upon the *'aqilah* only, and there is nothing of it obliged upon the heirs, so the *'aqilah* pays it alone. The man's *'aqilah* are his kinsfolk; his brothers, paternal uncles and paternal uncles' sons until the third grandfather). It starts with his closest subdivision of his tribe); if they are incapable, the closest responsible free males are added from his agnates by relation, then agnates by cause (sabab). These are the ones who pay the *diyyah*. If they are incapable or do not exist then it, ie the *diyyah*, is extracted from the *Bait al-Mal*. It is taken from the whole *'aqilah* equally; however it is taken from the capable one not from the incapable one. As for who is given this *diyyah*, it is given to the heirs of the one killed, and nothing of it is given to the *'aqilah*, due to the above mentioned *hadith* of Jabir, "**The *'aqilah* of the one killed said, 'Her inheritance is ours.' The Messenger of Allah (saw) said, 'No, her inheritance is for her husband and her children**.'"

**THE *DIYYAH* OF THE FOETUS**

If a pregnant woman is struck and her foetus is miscarried as a result of striking her, whether she died of the striking or not, then it is due

upon the striking one the foetus' *diyyah*, which is a male or female slave. If he does not find one, then ten camels. As for the *diyyah*'s obligation, this is due to what was narrated from Al-Mugheerah, "**that a woman struck by her husband's second wife with a tent and killed her while she was pregnant. So she was brought to the Prophet (saw) and he judged for her upon the killer's *'aqilah* a male or female slave (ghurra) in her foetus. Her agnates said, Do we pay *diyyah* for that which did not eat, drink, shout nor cry out at birth? The like of that is unavenged blood' (*atudiyyah ma la ta'ima wa la shariba wa la saha wa la istahalla, mithlu dhalika yutalla*). He said, 'Rhymed prose (saja') like the rhymed prose of the Bedouins**.'" (DOES NOT MAKE SENSE) It is narrated from ibn Abbas in the incident of Hamal bin Malik said, "**A boy whose hair had sprouted was aborted, and the woman died and he (ie the Prophet) judged with the *diyyah* upon the *'aqilah*. Her paternal uncle said, 'Verily a boy whose hair had sprouted was miscarried, O Prophet of Allah.' The father of the killer said, 'He is a liar. Verily he did not cry out at birth nor drink so his like is unavenged blood (*Innahu wallahi ma istahalla wa la shariba, famithluhu yutall*).' The Prophet (saw) said, 'is it rhymed prose of *jahiliyyah* and its soothsaying (*kuhhan*)? Give a (*ghurra*) as blood money in the child**.'" This is evidence that the obligatory regarding the foetus is the *diyyah*. As for the *diyyah* being a *ghurra*, male or female slave, this is due to what was narrated from Abu Hurayrah who said, "**The Messenger of Allah (saw) judged in the foetus of the woman of Banu Lahyan who miscarried a dead (foetus) with a *ghurra*, male or female slave**", and in a narration, "**They litigated to the Messenger of Allah (saw) and he judged a ghurra in the *diyyah* of her foetus; a male or female slave**." As for if he does not find a male or female slave, then ten camels, this is due to what came in the narration of ibn Abi Asim, "'**He has no male or female slave.' He said, 'Ten camels.' They said, 'He has nothing unless we assist him from the sadaqah of Banu Lahyan', so he assisted him with it**."

**THE *JINAAYAH* IN WHAT IS LESS THAN LIFE**

The *jinayah* (offence) in what is less than life is the *jinayah* on one of the organs of the man's body, one of his bones, on his head with a head wound or on a part of his body with a wound, irrespective of his being a man or woman, freeman or slave, Muslim or *dhimmi* or *must'amin*. Some *fuqaha* consider that retaliation in what is less than life, in terms of the limbs is what came in the *ayah*, "*We prescribed for them therein; The life for a life, eye for eye, nose for nose, ear for ear, tooth for tooth, and retaliation is for the wounds*" [TMQ Al-Ma-idah:54] (THIS AYAH REFERENCE IS INCORRECT). So they set the principle, "**Tooth for tooth**" retaliation in what is less than life of the limbs, so whoever plucks out the eye of anyone, his eye is plucked out and so on, despite this *ayah* being revealed with respect to the Bani Israil and is a narrative for them and not speech to us. The *Shar'* of those before us is not our *Shar'*, thus those who cite it and take it as an evidence erred because we are not addressed by it.

The reality is that the *jinayah* in what is less than life is not deduced by this *ayah*, rather it is deduced by what is mentioned in the a*hadith* about that, because this *ayah* is a narration about Bani Israil. It is the *Shari'ah* of the Jews and we are not addressed by it, so it is not suitable as evidence; rather it is not suitable to be evidence as long as we are not addressed by it. Moreover, there did not come in the Qur'an any evidence stipulating the *jinayah* in what is less than life. As for His saying *Ta'ala,* "*Whoever transgresses against you then you transgress likewise against him*" [TMQ Al-Baqarah:194], it was revealed regarding the Muslims' dealing with *kuffar, and* not in regards of punishments in what is less than life. The text of the *ayah* is; "*The sacred month is for the sacred month, and retaliation is for the forbidden things (hurumat). And whoever transgresses against you, then you transgress likewise against him. And fear Allah and know that Allah is with the pious (muttaqeen)*" [TMQ Al-Baqarah:194].

That is because there was no fighting in the sacred month at that time, so Allah explained in this *ayah* that if the *mushrikun* fight you in the sacred month, you fight them in the sacred month, and whoever transgresses against you then fight him with the like of what he

transgressed against you. The meaning is that the *kuffar* are challenged with similar to what occurred from them. So Allah *Ta'ala* says the principle with the *mushrikun* is that the sacred month for the sacred month. He then said for the forbidden things is retaliation ie treating in kind takes place in forbidden things. He then derived from this principle, that you face any assault against you with a similar assault. The subject is the subject of fighting between Muslims and *kuffar*; the subject is not the subject of punishment in what is less than life. The evidence for that is the *ayat* before it which are contiguous to it. Allah *Ta'ala* says, "*Fight in the way of Allah those who fight you, but do not transgress. Verily Allah loves not the transgressors. Kill them wherever you find them, and expel them from where they expelled you. Persecution (fitnah) is worse than killing. And fight them not in the Sacred Mosque until they fight you therein, but if they fight you then fight them. Such is the recompense of the kuffar. And if they cease, verily Allah is Most Forgiving (Ghafoor), Most Merciful (Raheem). Fight them until there is no more persecution (fitnah) and the deen is for Allah. If they cease, there is no* assault *except against the oppressors. The sacred month is for the sacred month, and retaliation is for the forbidden things (hurumat). And whoever transgresses against you, then you transgress likewise against him. And fear Allah and know that Allah is with the pious (muttaqeen)*" [TMQ Al-Baqarah:190-4]. This is explicit that the subject is the subject of war between Muslims and *kuffar;* so the *ayah* is specific in this subject. Hence it is not suitable as an evidence for punishment regarding what is less than life. As for His saying *Ta'ala*, "*If you punish, then punish them with the like of what you were punished with*" [TMQ An-Nahl:126], it is like His saying *Ta'ala*, "*The recompense of an evil is a similar evil*" [TMQ Ash-Shura:40] meaning repelling harm from oneself and meeting assault with its like. It is not an explanation of the punishment regarding what is less than life. Rather it is related to repelling harm, which is not valid except with the like of what one is harmed with; and it is not valid to exceed that, by the evidence of His saying after it, "*But if you endure patiently…verily it is better for the patient*" [TMQ A-Nahl:126]. Hence this *ayah* is not suitable as an evidence for the punishment by the

state regarding what is less than life. Accordingly, it is obvious that there is nothing in the Qur'an that indicates of the punishment regarding what is less than life; thus the evidence is the *Sunnah*, and nothing else.

As for what came in the *Sunnah* regarding punishments in what is less than life, the one who examines the matter does not find that there is retaliation regarding any of the body's limbs, nor any bone other than the tooth. As for what came from Al-Hasan from Samurah that the Messenger of Allah (saw) said, "**Whoever kills his slave, we will kill him, and whoever mutilates his slave, we will mutilate him**"; and what Abu Dawud extracted that the Prophet (saw) said, "**Whoever castrates his slave, we will castrate him**", they are specific regarding the punishment of the master for his slave and not general. It is regarding the subject of the master dealing with his slave, not the subject of explaining punishments. So, it is specific to the master's punishment, if he does that to his slave. It is not generalised in every person; so it is not general in the punishment of all people. Even if he were to mutilate the nose of a slave, but not his slave, he is not mutilated for it; and if he castrates a slave other than his slave, he is not castrated for it, because the *hadith* does not indicate that as it says, "**his slave**", and it says, "**mutilate his slave**", and it said, "**castrated his slave**." It did not say, "**a slave**", nor say, "**anyone**"; the transmission is of the word, "**his slave**"; so it is specific to him, and does not exceed him to another, in any way whatsoever. It does not indicate retaliation regarding the body's limbs, by any indication.

It might be said that we have cited the *hadith* that, "**Whoever kills his slave, we will kill him**", and we made it an evidence that the free man is killed for the slave, despite its being specific to the subject of the master's dealing with his slave. The answer to that is that the *hadith*, "**Whoever kills his slave, we will kill him**", does not indicate that the free man is killed for the slave via the wording indication (*dalalat al-mantuq*), but rather indicates that via the meaning indication (*dalalat al-mafhoum*). His (saw) saying, "**Whoever kills his slave**", indicates via its *mantuq* that if the master killed his slave,he is killed for him and does not indicate other than that. It does not indicate that the master

is killed for the slave but rather indicates that he is killed for his slave only. However, the meaning (*fahwa*) of the speech indicates that the master is killed for other than his slave by greater reasoning ie if the master is killed for his slave, though he owns him and disposes of him, then it is by greater reason that he be killed for killing other than his slave. So this is an indication of *mafhoum* and not the indication of *mantuq*, which is absent in the *hadith*, "**Whoever mutilates his slave, we will mutilate him**", and the *hadith*, "**Whoever castrates his slave, we will castrate him**." They do not indicate via the meaning of the speech (*fahwa al-khitab*) that were he to mutilate a slave other than his slave, he would be mutilated, nor if he castrates a slave other than his slave, he is castrated for him. This is because it is for the master to discipline his slave, but it is prohibited that disciplining reaches to the point of destroying one of his limbs. Thus, the fact that he is prohibited from amputating or castrating him; does not mean, by greater reason, that he can do this to him if he was a slave other than his slave. That is because the *mafhoum al-muwafaqah* could be of the kind of drawing attention (*tanbeeh*) to the higher (*adna*) by mentioning the lower. It could also be of the kind of drawing attention to the lower by mentioning the upper. It could as well be of the kind of equivalence. There is nothing of this in, "**Whoever mutilates his slave**", and, "**Whoever castrates his slave**"; there is nothing therein of drawing attention to something by mentioning another thing. However, in, "**Whoever kills his slave**", the hadith draws attention to the lower by mentioning the upper, since if he is killed for his slave, then his killing for other than his slave is of greater reason. Thus it is valid that his saying, "**Whoever kills his slave, we will kill him**", is an evidence for killing the free man for the slave via the indication of the meaning of the speech. Whereas his saying, "**Whoever mutilates his slave**", "**Whoever kills his slave**" is not valid to become an evidence that whoever mutilates another is mutilated for it and whoever castrates another is castrated for it. So, if it is invalid to use it as evidence for retaliation regarding what came by text, namely mutilation and castration, it is invalid to use as an evidence for retaliation regarding other than these two. Hence, these two *hadith*

are invalid as evidence for retaliation in the limbs/organs. Moreover, whoever follows the *ahadith* finds that not even one *hadith* is authenticated regarding retaliation in any of the body's organs. Therefore, there is absolutely no retaliation regarding the body's organs. The eye of the one who plucked another's eye is not plucked, nor is the ear of the one who cut another's ear cut, nor is the nose of the one who cut another's nose cut, because the *ayah*, "*We prescribed for them*" [TMQ 5:54], (AYAH REFERENCE INCORRECT) is with respect to the Jews and not us. We are not addressed by it and the *Shar' (*legislation) of those before us is not *Shar' for us*. It is also because there came no text regarding that, not in the Book of Allah nor the *Sunnah* of the Messenger of Allah. Since there came saheeh a*hadith* regarding the *diyyah* of every organ of the body, then the punishment for any bodily organ is the *diyyah* that came in the text of the *hadith* regarding that organ.

This is with respect to the body's organs. As for the bones of the body, there is evidence from the *Sunnah* that there occurs retaliation in the tooth bone. Al-Bukhari extracted from Anas, "**that his paternal aunt, Ar-Rubayyi'a, broke the middle incisor of a slave girl. They requested her pardon but she refused, and they offered compensation but she refused. They came to the Messenger of Allah (saw) and she refused except retaliation, so the Messenger of Allah (saw) commanded with retaliation. Anas bin An-Nadhr said, 'O Messenger of Allah, will the middle incisor of Ar-Rubayyi'a be broken? No, by the One who sent you with the Truth, her middle incisor will not be broken!' The Messenger of Allah (saw) said, 'The bill of Allah is retaliation'; but the people became contented and pardoned, so the Messenger of Allah (saw) said, 'There are among the slaves of Allah those that who, if they swear upon Allah, He fulfilled them**.'" WHAT IS A BETTER WAY OF SAYING THIS??) In this *hadith*, there is evidence that there is retaliation in the tooth bone if it is broken ie the tooth of the one who broke it is broken. However, there are issues in the *hadith* that must be noted when deducing from it. Among them is that the Messenger's saying, "**The bill (*kitab*) of Allah is retaliation**", is not an allusion to the *ayah*, "*We prescribed therein for them, a life for life*". Rather it is an

allusion to His saying *Ta'ala*, "*Retaliation has been prescribed for you*" [TMQ al-Baqarah:178], because the *ayah*, "*We prescribed therein for them*", is alluded to by the principle, 'Tooth for tooth', since it is well-known for it; rather the most famous of what is therein is the principle, 'Tooth for tooth.' So if it were alluded to, the hadeeth would say, 'The prescription of Allah is a tooth for tooth', particularly as the incident is an incident of a tooth. The fact that he said, "**The bill of Allah is retaliation**", indicates that what is intended is the *ayah* of retaliation, which is His saying *Ta'ala,* "*Retaliation has been prescribed for you*", not the *ayah*, "*We prescribed for them*". Also the *ayah*, "*We prescribed for them*", did not express the punishment for organs with retaliation, rather it enumerated the organs wherein the rule of 'tooth for tooth' occurs. As for retaliation, it expressed it via the punishment for wounds; so after it enumerated the organs it moved onto the wounds and said, "*And for the wounds, retaliation*." The incident is an incident of a bone, not a wound, thus it is not an allusion to the *ayah*, "*A tooth for tooth*", but rather to the *ayah* of retaliation which is His saying *Ta'ala*, "*Retaliation has been prescribed for you*." Another issue is that the *hadith* is a text upon the tooth only, so it is evidence that the obligation of retaliation is regarding the tooth, and nothing else. It is invalid to deduce retaliation from it in any other bone, because the text is specific to the tooth, and there is no analogy or resemblance of analogy in it. Thus the *hadith* is not evidence for retaliation regarding any bone of the body so, by greater reason, it cannot be evidence regarding any of the body's organs, because it is regarding the bones and not the body's organs; and it is specifically regarding the tooth.

Taking these issues in account during the deduction via the *hadith*, shows that the *hadith* is evidence that there is retaliation regarding the tooth when it is broken; but there is no retaliation absolutely regarding any other bone, due to the absence of evidence for that, and because the *hadith* of Anas does not indicate other than breaking the tooth. Accordingly, it is clear that there is no retaliation regarding any organ of the human body, nor regarding any bone of the human body, other than the tooth when it is broken. The only punishment for

any organ is what came in its regard in the *hadith* of compensation (*arsh*).

Moreover, the Messenger (saw) did not say, 'A tooth for tooth', but rather he said, "**Retaliation**", which means that there is retaliation in the tooth during punishment. So if the tooth is broken, the tooth of the one breaking it is broken; and if the tooth is uprooted then the tooth of the one uprooting it is uprooted. If it is only moved from its place, then likewise this is done to the perpetrator because this is the retaliation.

However, it is necessary to know that just as retaliation came regarding the tooth, there came *diyyah* regarding the tooth. It came in the letter of the Prophet (saw) to Amru bin Hazm when he sent him to Yemen, "**And regards the tooth, there is (a *diyyah* of) five camels**." So when is retaliation obliged and when is the *diyyah* obliged? Some *fuqaha* say that retaliation regarding the tooth is only in the intentional, so there is retaliation for whoever strikes anyone's tooth intentionally according to the *hadith* of Anas. As for the non-intentional, there is *diyyah* regarding it. Hence, if he strikes him intending to break his tooth with something that breaks in most cases, or with something that does not break the tooth but linked to something that makes it break the tooth, or does an action which breaks the tooth in most cases, then in these situations only it is intentional, and retaliation takes place. If he strikes him without intending to break the tooth or with something that does not break the tooth, but he broke his tooth, then there is no retaliation, but rather only the *diyyah* is obliged, which is five camels.

This is the rule of retaliation in the organs and bones of the human body. So, there is absolutely no retaliation regarding an organ of the human body, nor any bone of the human body except the tooth; in it alone there is retaliation. As for the wounds that are in the body (WHAT DOES THIS MEAN), retaliation regarding them is established by the *Sunnah*.

It came in Saheeh Muslim from Anas that the sister of Ar-Rubayyi'a, Umm Haritha, wounded a person and they litigated to the Prophet (saw), so the Messenger of Allah (saw) said, "'**Retaliation, retaliation.'**

**Umm Ar-Rubayyi'a said, 'O Messenger of Allah, will it be retaliation from her? By Allah, there will not be retaliation from her!' The Messenger of Allah (saw) said, '*Subhana'Allah*. O Umm Ar-Rubayyi'a, retaliation is the bill of Allah.' She said, 'No, by Allah, there will never be retaliation from her.' She persisted until they accepted the *diyyah*, so the Messenger of Allah (saw) said, 'Verily among the slaves of Allah there is one who if he swears upon Allah, He fulfills him**.'" This *hadith* indicates that there is retaliation in wounding, and the Messenger's allusion here in his saying, "**Retaliation is the bill of Allah**", is an allusion to His saying *Ta'ala*, "*Retaliation has been prescribed for you*" [TMQ Al-Baqarah:178], not an allusion to His saying *Ta'ala*, "*We prescribed for them therein*" [TMQ :54] (INCORRECT REFERENCE). It is also narrated from Jabir, "**that a man was wounded, so he intended to retaliate. The Prophet (saw) prohibited retaliation from the one who inflicted the wound, until the one wounded heals**." It is also narrated from Amru bin Shuaib from his father from his grandfather, "**that a man stabbed a man with a horn in his knee and he came to the Prophet (saw) and said, 'Retaliate for me.' He said, 'Until you heal.' Then he came to him and said, 'Retaliate for me from him', so he retaliated for him. Then he came to him and said, 'O Messenger of Allah, I have become lame.' He said, 'I forbade you but you disobeyed me. May Allah distance you and may your lameness be non-avenged.' Then the Messenger of Allah (saw) prohibited that a wound be retaliated for until its victim heals**." These two *hadith*, even if they came to indicate that retaliation for wounds is after the wound heals, nevertheless they indicate that there is retaliation regarding wounds ie there is retaliation regarding them via indication via illusion. So they are good evidence that there is retaliation regarding wounds ie there is retaliation regarding them. Hence there is retaliation regarding the wounds ie that which is in the body.

However, retaliation regarding wounds does not take place unless its conditions are fulfilled. Among its conditions is that it be intentional; so if it is not intentional ie accidental, then there is no retaliation. There is, however, legal judgement regarding it, if it was not a deep wound, or rupture via intercourse. If it were so, then there is *diyyah*

regarding it. Among its conditions is that it is not dangerous ie it will not lead to the death of the one retaliated against; if it were dangerous ie death is feared, then there is no retaliation. Instead, there is legal judgement, if it was not a deep wound or rupture via intercourse. Among its conditions is that it is not of that which retaliation regarding it can't be undertaken except that the striker errs, exceeds or reduces. If it is the case, then there is no retaliation. There is rather legal judgement if it is not a deep wound or rupture via intercourse. Likewise, there is no retaliation if the right's owner pardons or takes the *diyyah* or a verdict and abandoned demanding retaliation. Retaliation only occurs if the victim demands it; if he does not demand, then there is no retaliation, because this is the slave's right. If these conditions are fulfilled, retaliation occurs; but if it is devoid of any condition among them then no retaliation. Rather its punishment is the financial penalty that the *Shar'* mentioned. There is no retaliation except after the wound heals, due to the above mentioned *hadith* of Jabir, and because it came in the *hadith* of Amru bin Shuaib, after the Messenger's permission, the saying, "**Then the Messenger of Allah prohibited**." This saying indicates the forbiddance of retaliation before healing, because the word 'then' requires succession, so the prohibition occurring thereafter is an abrogation for the permission occurring beforehand. So retaliation does not take place in wounds except after the wound heals.

This is in wounds that are in the body. As for the *shijaj* (head wounds), there is no retaliation regarding them ie no retaliation takes place for them. That is because they are not included in the a*hadith* of wounds, because they are not wounds, nor does the term 'wounds' (*jirah*) apply to them. It is well known among the scholars that *shijaj* is in the head and wounds in the body, so the a*hadith* of wounds are not evidence for them since they do not indicate neither in the language or *Shar'a*. Moreover, there is no text, neither in the Book nor in the *Sunnah*, indicating retaliation for *shijaj*; rather the text only came regarding the *diyyah* of wounds, thus the punishment for *shijaj* is the *diyyah* that came in the *Sunnah*.

From all that, it became clear that the punishment for less than life has details. The punishment for all the body's organs and all the bones of the human body except the tooth and the *shijaj* ie head wounds is a purely financial penalty which is the *diyyah* that came in the *Sunnah*. There is no bodily punishment for them and no *qawad*, ie no retaliation. As for the teeth and body wounds, they have bodily punishments and financial penalties. So, if the teeth were attacked intentionally, their punishment is retaliation. If it were non-intentional ie accidental, or the victim abandoned retaliation and demanded *diyyah*, in these two situations there is *diyyah* and nothing else ie the punishment for them is a financial penalty. If the wound fulfills all conditions, and the victim does not abandon retaliation, its punishment is then bodily punishment which is *qawad* ie retaliation. If one of its conditions is absent or the victim abandoned retaliation then at that point its punishment is a financial penalty. As for the level of these punishments, it is examined. If there is a text that determines its *diyyah*, the wound's punishment is the *diyyah* mentioned in the text. That is restricted to two wounds; firstly the deep wound that reaches the interior and the second is rupturing the child via intercourse. A *hadith* came regarding the first, and the evidence for the second is silent *ijmaa'*. As for other than these two bodily wounds, there is no text to determine its *diyyah*, so its punishment becomes a just verdict.

**THE *DIYYAH* OF THE ORGANS AND BONES OF THE HUMAN BODY**

The *diyyah* of every organ of the human body, and each of its bones, is what came in the *Sunnah*; and the *diyyah* came explicitly in the *Sunnah*. It is narrated from Abu Bakr bin Muhammad bin Amru bin Hazm from his father from his grandfather, "**that the Messenger of Allah (saw) wrote to the people of Yemen a letter. And in his letter was, 'whoever randomly killed a believer with evidence, then it is retaliation unless he pleased the deceased's relatives. And for life the *diyyah* is one hundred camels. There is for the nose, if it is cut off the *diyyah*; for the tongue is the *diyyah*; for the two lips is the**

***diyyah*; for the two testicles is the *diyyah*; for the penis is the *diyyah*; for the back is the *diyyah*; for the two eyes is the *diyyah*; for one leg is one half *diyyah*; for the deep head wound is one third *diyyah*; for the deep internal wound is one third *diyyah*; for the bash that brings bones out is fifty camels; for every finger of the hand and leg is ten camels; for the tooth is five camels, for the bash that shows the bones (*mawdhuha*) is five camels. And the man is killed for the woman, and upon the owners of gold is one thousand dinars**'" (narrated by An-Nasaa'i). Hence the punishment of the organs is the *diyyah* ie compensation, and nothing else.

The detail of these punishments is; whoever damages that of which the human has only one, there is the *diyyah* for it, and that of which he has two, then one half *diyyah*. The Messenger (saw) wrote in his letter to the people of Yemen and in it, "**For the nose if it is cut is the *diyyah*, and for the tongue is the *diyyah***." And in the book (he said), "**For the penis is the *diyyah***", "**for the back is the *diyyah***." These organs are found solitarily in the human. The Messenger wrote in his letter, "**For the two lips is the *diyyah*, for the two testicles is the *diyyah***", and he wrote in it, "**For the two eyes is the *diyyah*, and for one leg is one half *diyyah***." These organs exist dually in the human,so one of them is one half *diyyah*. As for the back (*sulb*), it came in the dictionary in its explanation, "The *sulb* or *sulub* is, 'A bone from the *kahil* (anklebone) to the *'ajb* (coccyx)'", and what is meant is the *matn* ie the back. It is also said it means here is that which is in the net that comes down from the brain to separate wetness in the organs and not the back itself, by the evidence of what ibn Al-Mundhir narrated from Ali (ra) that he said, "For the *sulb* is the *diyyah*, if it prevents sexual intercourse". However, the *Shar'* texts are explained by the linguistic meaning and not by the sayings of the *Sahabah*, except if there came for it a *Shari*' meaning in the Book and *Sunnah*, a matter which did not occur. So the meaning of the back is what came in the language. As for what the human has four of, for all of them is the *diyyah*, and for each one of them is one-quarter *diyyah*. These things are the eyelids and their lashes. And what there are ten of, there is the *diyyah* for them and for each one of them its tenth, which are the fingers of the two

hands and the toes of the two legs. As for what there are three things of, there is the *diyyah* for them and in each one of them its third, which is the two nostrils and the partition between the two. This is the case of the body's organs, because the a*hadith*, and whoever follows what came in the *diyyah* of the organs, indicate that. As for the details of that, it is as follows:

**THE ORGANS IN THE HEAD**

**Two eyes;** If the two eyes are struck, then for the two is the *diyyah*, and for one eye is one half diyyah, due to the Prophet (saw)'s saying, "**For the two eyes is the *diyyah***"; it was also narrated from the Prophet (saw) that he said, "**For one eye, fifty camels**." There is no difference here between the two eyes, whether being small or big, beautiful or ugly, sick or cross-eyed, or scorched. If there is within them white that does not reduce sight, then the *diyyah* is not reduced; if it reduces the sight, then the *diyyah* is reduced by its extent. It is not meant by reducing the sight its reduction from perfection such as 6/6 or 6/9 but rather reducing it from what it was before it was struck. For the disappearance of the sight is the *diyyah*, because every two organs whose *diyyah* is obliged by their disappearance, it is obliged by the disappearance of their benefit. If one commits a criminal offence against the head of somebody due to which he lost sight, he has to pay the *diyyah* since sight was lost because of his offence. If he did not lose sight but he treated them then it was lost by treatment, then he has to pay its *diyyah*, since it was lost because of his action. If they differed regarding the disappearance of the sight, it is referred to two or more experts because they have a way to know that by inspecting the eye that is the place of sight and understanding its situation. If the disappearance of sight is proved and experts say its return is not expected, the *diyyah* is obliged; if they say its return is expected at a time they defined; it is awaited until then and the *diyyah* is not given until the period expires. If sight returns, it is removed form the offender; if it did not return, the *diyyah* is proved. If the one offended against dies before the sight returned, the *diyyah* is proved whether he died within the period or not. If a stranger comes and plucks his eye within the period, the *diyyah* is proved on the first offender, because

he removed the sight which did not return, and upon the second is a just (*hukumat*) because he removed an eye without having light whose return was expected.

If somebody was attacked and his sight was reduced, there is for it a just court. And for the eye of the one-eyed person is one half *diyyah* due to his (as) saying, "**for the two eyes is the *diyyah***." It is incorrect to say that Umar, Uthman and Ali (ra) judged with the *diyyah* in the eye for the one eyed person, and the *Sahabah* remained silent upon that, so it was *ijmaa'*. One should not say that, because it has been proved by the *Sunnah* that for it there is one half *diyyah*. Even if we assumed that *Ijma as-Sahabah* has been proved, *ijma* does not abrogate the *Sunnah*; so no action is done upon it, and the *Sunnah* remains the evidence.

**Two ears;** For the two ears is the *diyyah*, and for one is one half *diyyah*, due to what came in the Prophet (saw)'s letter to Amru bin Hazm, "**For the two ears there is the *diyyah***." This means that for one eye there is one half *diyyah*; and it is understood that if part of one of them is cut, its *diyyah* is obliged to the extent of what was cut. So for its half there is one half its *diyyah*, for its one fourth is one fourth of its *diyyah* and so on, whether it was cut from the ear's top or bottom, and whether they differed in beauty or not. If one aggressed against the ear and paralysis afflicted it then there is one half *diyyah*, and if he afflicted the two ears then there is the *diyyah*, because the paralysis is like cutting, so whenever *diyyah* is obliged by its cutting, then it is obliged by afflicting it with paralysis. One should not say that its paralysis does not prevent hearing the same as cutting does not prevent hearing. If they were not cut but their hearing disappeared, therein is the *diyyah* because the disappearance of the organ's benefit is like the organ's disappearance, and due to what was narrated from Muadh, "**For the hearing there is the *diyyah***." If hearing disappears from one of the two ears, one half *diyyah* is obliged. And if his ear was cut and accordingly his hearing was lost, two *diyyah*s are obliged, due to the Messenger's saying, "**For the two ears there is the *diyyah***", and his saying, "**For the hearing there is the *diyyah.***" This means that for

the organ there is a *diyyah*, and for its benefit there is a second *diyyah*, and it is explicit regarding that.

**The nose;** No doubt the nose is three organs namely the two nostrils and partition between the two because the partition is a part of it, as it is composed of three things. If the whole nose is struck like cutting its soft part (*marin*), therein is the *diyyah*, due to the Messenger of Allah (saw)'s saying, "**For the nose if it is cut there is the *diyyah***", and in a narration, "**For the nose if its *marin* is cut there is the *diyyah***." If only its tip is cut, then one half *diyyah* due to the Messenger of Allah (saw)'s saying, "**If its tip is cut, then it is one half *'aql***." If one of its nostrils is cut there is one-third *diyyah*, and if the partition between the two is cut there is one-third *diyyah*. If it is struck, then it became paralysed, if all of it is paralysed, there is the *diyyah*, because it is like cutting, for there remains no life in it. If one nostril is paralysed, there is one-third *diyyah* and if only the partition between the two is paralysed, there is one-third *diyyah*. And if the sense of smell disappears ie

it was ruined, there is *diyyah*, due to the Prophet (saw)'s saying, "**For the (*masham*) is the *diyyah***", ie smell (*shamm*). And if he cuts his nose and his smell disappears, then upon him is two *diyyah*s, because smell is not the nose. So the *diyyah* of one of the two is not included into the other similar, this is like hearing related to the ear.

**Two lips;** If the two lips are cut, damaged or afflicted with paralysis, there is the *diyyah*, due to the Messenger of Allah (saw)'s saying, "**For the two lips there is the *diyyah***." If that were in one of the two (lips), there is one half *diyyah*; and if its benefit disappears like blowing, letters, restraining saliva, covering the teeth and protection from what harms the mouth, it is examined. If all the benefit of the two disappears, there is the *diyyah*, and if the benefit of one disappears, it is measured and given what is equivalent to its benefit of the *diyyah*. So it is given according to what is known of its benefit—one fifth *diyyah* for blowing, one fifth for protecting the mouth and so on.

**The tongue;** If the speaking tongue is damaged, there is the *diyyah*, due to the Messenger of Allah (saw)'s saying, "**For the tongue there is the *diyyah***", whether he was old and speaking or young and not yet

speaking. If it were assaulted and its benefit disappears, there is the *diyyah*, and the tongue's benefit is speech and taste. If speech alone disappears, there is the full *diyyah,* and if the taste alone disappears, there is the *diyyah*, because taste is a sensation like smell. However, if they both disappear together, then for the whole benefit is the *diyyah*, because the tongue's benefit is like the tongue so there is the *diyyah* for it. Since the tongue's benefit is speech there is the *diyyah*, and since taste is a sensation like smell there is the *diyyah*. If part of his tongue is cut, then it is applied to it what is applied to the ear, regarding the extent of what is cut. So it is calculated and given from the *diyyah* the proportion that was cut from the tongue. Likewise, if its benefit is reduced, *diyyah* is given according to the extent of what was reduced, according to the view of experts.

All this is regarding the speaking tongue. As for the mute tongue, the full *diyyah* is not obliged for it, since it is not like the nose and ear whose disappearance does not affect its benefit. Rather it is like the hand and leg when paralysed, this affects its benefit, so likewise the mute tongue is considered like the paralysed tongue that affects its benefit, such that it is reduced from the full *diyyah* the extent of what was reduced from the benefit of the mute tongue in relation to the speaking tongue.

**Eyelids;** The eyelid or *ashfar* for the human are four, two eyelids to each eye, and for these four eyelids is the *diyyah*. That is acting according to the principle deduced from the totality of the Messenger's a*hadith* regarding body organs, such that which is found as only one, there is the *diyyah*, that which is found as two of them, therein is one-half *diyyah* and that which is found as more than that, there is of the *diyyah* to the extent of what it has of parts. Accordingly, for the four eyelids there is the *diyyah* and for each one of them there is one-quarter *diyyah*. Similar to that is the lashes of the two eyes, which is the hair upon the eyelids, and they are other than the eyelids. The human has four eyelashes so there is the *diyyah*, and for every eyelash there is one-quarter *diyyah*. It is a *diyyah* other than the *diyyah* of the eyelids.

**Two eyebrows;** The two eyebrows are considered as one organ like the eyes, so for the two is the *diyyah* and for each one of them is one half *diyyah*. The benefit of the two eyebrows is not produced by them, so they are like the ear. Thus if they are damaged and their benefit disappears, then there is the *diyyah*, and if their benefit disappears while they are not damaged therein is the *diyyah*. And if they are damaged and their benefit remains, then there is the *diyyah*, so they are just like the ear.

**Teeth;** All the teeth are one organ (OR BODY PART??) and each tooth is a part of this organ. However, the *diyyah* for teeth is not by calculation of what exists of the teeth, because the text defined the *diyyah* for each tooth, thus the text is followed. The *diyyah* of each tooth is five camels because the Prophet (saw) said, "**For the tooth there is (a *diyyah* of) five camels**." It is narrated from Amru bin Shuaib from his father from his grandfather from the Prophet (saw) who said, "**For the tooth there is five, five**." There is no difference regarding it between the tooth and molar tooth due to what was narrated from ibn Abbas that the Prophet (saw) said, "**The fingers are equal and the teeth are equal. The middle incisor and the tooth are equal, this one equal to that one**." However, there is a difference between its return back or otherwise; if the tooth falls and does not return back, its *diyyah* of five camels is taken. If another grows in its place, its *diyyah* is not obliged. However, if it returns back small or deformed, then there is (*hukumat*) because what appears is that that this is because of the assault against it. So if it is possible to measure its reduction from its equal, then there is the *diyyah* to the extent of that reduction. Likewise, if it has a gap able to be measured, then there is the *diyyah* to the extent of what disappeared from it. If the tooth breaks, then there is the *diyyah* to the extent of what disappears.

**Hair;** The hair of the head, beard and mustache, and hair of the two eyebrows, in each of them is the *diyyah*. If a strike causes baldness in the head, it is looked into. If it does not grow, then there is the *diyyah*; likewise there is the *diyyah* if it occurred in the beard and mustache, and similar is the two eyebrows. For one eyebrow there is one half *diyyah* ie in its hair. If a portion of it disappears and a portion remains,

or a portion grows and a portion remains, it is measured by the area like the two ears and the nose's soft part (*marin*); so *diyyah* is paid to the extent of the reduction. There is no difference in this hair between its being thick or light, beautiful or ugly, or its being of a child or old person, because what is known regarding the *diyyah* of organs is that the situation does not differ because of that. The man of the shaven beard is equal to the one who grows his beard, as long as his hair used to grow and be shaved, and it cut then following the strike it does not grow.

**The two jawbones;** For the two jawbones there is the *diyyah*, and for each of them is one half *diyyah*, because they exist dually for the human, so for the two is the *diyyah*, and for each one of them is one half *diyyah*. It is not true to say that if a portion of them is damaged, the two jawbones do not become damaged but rather fractured. However, if they are wounded then this comes under the section of the wound; as for damaging the organ, what occurs is the fracture. So if they were fractured, then there is the *diyyah*, and if one of them was fractured then there is one half *diyyah*.

**The mind (*'aql*);** For the disappearance of the mind there is the *diyyah*, due to what came in the letter of the Prophet (saw) to Amru bin Hazm, "**For the mind there is the *diyyah***." Though it is not represented in the brain alone, rather in the combination of the senses, brain and precedent information, however it is restricted to the brain, since it is the centre of the senses. So any damage occurring to the mind it occurs to the brain, hence the mind is considered the benefit of the brain. If the brain is damaged and the mind disappears, *diyyah* is obliged. And if the mind disappears while the brain is not removed from the head; rather it remains, but the mind disappears, then the *diyyah* is obliged. The main point of discussion is the mind and not the brain even if its organ is the brain, in its capacity as the centre of the senses, the centre that remembers precedent information and the centre of the linkage. If a part of the brain disappears such as he becomes intermittently insane then there is *diyyah* proportional to what is reduced from his mind. If his memory is lost, then it becomes impossible for him to judge upon things; whereas if what happens to it

is weakness in judging such as what is called weak-mindedness (*hubl*), *diyyah* is obliged for it in proportion to what is reduced, because that for which *diyyah* is obliged, then part of the *diyyah* is obliged for its part.

**Twisted face (*As-su'r*);** *As-s'ur* is that his face turns to one side, and the origin of *as-s'ur* is an illness that the camel gets in its neck, so it becomes bent. Whoever assaults a person and his neck twists until his face turns to one side, then there is the *diyyah*. Even if it is not a specific organ in the body,nevertheless it is narrated from Zayd bin Thabit that he said, "For the dented face (sa'ar) is the *diyyah.*" There is nobody contradicting him among the *Sahabah*, so it became *ijmaa'* since it is of what is denied, as it is a judgement of the *diyyah* for a non-organ, and for what there is no text about, like the mind. So the *Sahabah*'s silence over it makes it of the silent *ijmaa'*. Similar to the twisted face is the paralysis of half of the face, so if one strikes him and paralysis afflict him, then there is the *diyyah*. As for someone hitting him and his face becomes rigid/immobile, then there is a just compensation, because it does not resemble a twisted face, thus it is not included under it and because there came no text about it.

**BODILY ORGANS OTHER THAN IN THE HEAD**

**The hands;** What is meant by the hand is the hand which the *diyyah* is obliged for it, which is the hand from the (*kaw'*) ie the wrist. This is the hand that is cut in theft, because this is its linguistic meaning when mentioned without restriction. If another meaning is intended, a connotation is attached to indicate this, or a description to denote it. Thus Allah *Ta'ala* said regarding *wudu*, "*…and your hands until the elbows*" [TMQ Al-Ma'idah:6], and when He intended this meaning He designated it without restriction, "*Cut the hands of both of them*" [TMQ Al-Ma'idah:38]. The hands for which is the *diyyah* are the two hands to the two (*kaw'*) ie to the two wrists. Whereas, if they were cut before, and there occurred damage above the wrist or a fracture occurs in the hand above that, or at the two wrists or the like, then there is a just compensation ie evaluation of the value of the healthy hand and the value of the hand after the fracture or damage, then the difference between the two is paid. *Diyyah* is obliged for damaging the

hands in all circumstances, whether cutting, paralysis or ruin or otherwise.

**Two feet;** *Diyyah* is obliged for the two feet, because they are organs in the human and each human has two of them, and due to the *hadith* of Muadh, "**For the two feet there is the *diyyah***." For one foot there is one half *diyyah*. The meaning of the two feet is the feet to the ankles, because this is the meaning of foot when designated without restriction, and it does not indicate something else. If the two feet are damaged then there is the *diyyah*, and for one of them is one half *diyyah*. For the lame leg, like the twisted hand, there is the *diyyah*, because it is of the same meaning of lameness in other than the foot. *'Asm* is a twist in the wrist, and it is of the same meaning in other than the hand. Lameness is not a defect in the foot nor (*'asm*) a defect in the hand. If a fracture happens to the shank (*saq*), thigh, knee or the like, then there is a just compensation. *Diyyah* is not obliged except for the feet according to their linguistic meaning ie up to the ankles.

**Fingers;** In each finger of the hands and feet there is (a *diyyah* of) ten camels. This is due to what ibn Abbas narrated and said, The Messenger of Allah (saw) said, "**The *diyyah* of the fingers of the hands and feet is ten camels for each finger**." It is narrated from ibn Abbas who said, The Messenger of Allah (saw) said, "**This one and that one are equal**", ie the thumb and little finger. In the Prophet (saw)'s letter to Amru bin Hazm, "**For each finger of the fingers of the hands and feet is ten camels**." These evidences are explicit proof upon the *diyyah* of fingers; for each finger is ten camels. If there are more fingers than the five in the hand and foot and they are injured, then there is a just evaluation because they are not included in the *hadith*'s wording (*mantouq*). If the fingertips are damaged, it is looked into; if it is not the thumb, for each fingertip is one third of the finger's *diyyah*, because in each finger are three fingertips (DO YOU MEAN PHALANXES? PLEASE CHECK WORDING WITH A DOCTOR!!). Whereas, if it is damaged in the thumb, then for each fingertip there is one half the finger's *diyyah* because there are two knuckles in it. The text ordains ten camels for the whole finger, so the *diyyah* of a part of it is according to its extent of the finger.

**The two breasts;** For the two breasts there is the *diyyah*, because it is an organ existing dually in the human, and for one of them is one half *diyyah*, acting according to the texts of the *hadith* and what is derived from it. There is no difference in that between the woman and man, because they are two organs in the man just as they are two organs in the woman. However, in the woman's breast there is a benefit which is milk, so if the breast's benefit disappears due to a strike and the milk does not return, for the benefit is the *diyyah*. That is, the *diyyah* is for the breast if it disappears, because its benefit disappears together with it, so the *diyyah* is for the breast and the benefit is included therein, but if the breast remains and its benefit disappears, for the benefit there is the *diyyah*. Cutting of the two breasts and their paralysis is the same, because their paralysis means killing them. However if two buxom breasts are broken, for the two is a just evaluation because their ruin has not occurred. If their nipple is ruined and milk disappears because of that, then there is the *diyyah*; but if the milk does not disappear then there is its extent of the breast and it is measured as one eight of the *diyyah*.

**Backbone (*as-sulb*);** It is a bone that extends from the *kahil* (point at the neck between the two shoulders) to the *'ajb* (bottom end of the backbone), and there is a canal (*qanat*) extending from the brain until the (*'ajb*). It is a composition of vertebrae, and its benefit is to separate the wetness in the organs, and if ruin occurs in it, this prevents sexual intercourse, the stability of the body etc. The disappearance of its benefit does not require the damage of all its vertebrae, rather if some of them are ruined the human's benefit disappears, without difference between the man and woman. It is considered of the singular organs within the human body, with its vertebrae as part of it not organs; the organ is the backbone not each of the vertebrae. If the backbone is ruined then there is the *diyyah*, and if its benefit disappears then there is the *diyyah*. If one or more of its vertebrae is ruined and the benefit of the whole backbone disappears then there is the *diyyah*, whereas if a part of its benefit disappears, then what disappears of it is measured and its *diyyah* is calculated proportionally. If a vertebra is ruined without its benefit

disappearing due to its ruin, then there is a part of the *diyyah* according to the number of vertebrae in the vertebral column of the back; and if some of the benefit disappears like preventing sexual intercourse and some remains then it is evaluated according to the benefit remaining in it. Thus the rule of the backbone is like the rule of any organ which exists uniquely in the human being. Also there came a text upon it in the *hadith*, so in the letter of the Prophet (saw) to Amru bin Hazm, "**In the backbone is the *diyyah***."

**Ribs (*adla'*);** All of man's ribs are one organ, and it is an organ existing uniquely in the human. As for the ribs, they are parts of this organ, and not organs by themselves. For the chest ie all of the ribs, there is the *diyyah*, because it is an organ, acting according to what the *hadith* indicated. For each rib is part of the *diyyah* according to how many ribs exist in it. So all the ribs are counted and each one is taken in proportion to the total. If the rib is fractured and then heals, then there is a just evaluation, and if it is fractured and is ruined then there is the proportional *diyyah*.

**The two buttocks (*ulyatan*);** For the two buttocks there is the *diyyah*, because they exist dually in the human, and for each one of them is half *diyyah*. *Diyyah* is obliged for the two, if they are stripped to the bone beneath them; whereas if some parts of them disappear then *diyyah* is obliged proportionally, because for whatever is obliged the *diyyah*, then part of the *diyyah* is obliged proportionally to the damage. If the amount is unknown, a just evaluation is obliged, because it is a loss of unknown measure.

**The belly/stomach;** For the stomach there is the *diyyah*, if it is struck such that it does not hold stool, because it is an organ. However, it is not conceived to separate its benefit from it. If it is cut, it does not hold stool, and if it is struck and remains but does not hold stool, and as long as it is an organ that exists only uniquely, then there is the *diyyah*. Discussion of it is one regarding its benefit, and the rule regarding it is the rule regarding its benefit.

**The bladder;** For the bladder there is the *diyyah* if it does not hold urine, because it is an organ existing uniquely in the human so there is for it the *diyyah*. Its benefit is like the benefit of the stomach, which is

inseparable from it. It is different to the stomach, so it is not correct to say that both urine and stool are one category of excretion. Despite the fact that they are not of the same category, the issue is not of the category of the benefit but rather the category of the organ. The bladder and the stomach are two separate organs, each one different from the other; thus for the bladder alone there is the *diyyah*, and for the stomach alone there is the *diyyah*.

**The penis (*dhakar*);** For the penis there is the *diyyah*, due to what came in the Prophet (saw)'s letter to Amru bin Hazm, "**For the penis there is the *diyyah***", and because it is an organ existing uniquely in the human. Thus if it was cut or paralysed, or it became no longer useful for sexual intercourse, then there is the *diyyah*. *Diyyah* is obliged for the small and large penis, the old man, youth and castrated, whether impotent or not, capable of sexual intercourse or not, because the penis is an organ and its benefit does not result from it. Whoever's penis is ruined, then its benefit disappears, but his benefit could disappear whereas his penis remains. Thus *diyyah* is obliged absolutely for the one whose penis is ruined absolutely; but *diyyah* is obliged for the one whose penis is struck and its benefit disappears but his penis remains. This is if there was benefit in it at the moment of the strike. Whereas if there were no benefit before striking like the decrepit old man who is no longer capable of ejaculation or he were capable of ejaculation but not capable of sexual intercourse, then there is the proportion of what diminishes of its benefit. This is because the penis' benefit is sexual intercourse and ejaculation. Thus if what it is capable of is ruined, then there is the proportion of what was lost. As for the impotent, he is like the healthy, because he is capable of sexual intercourse with the *thayyib* (non-virgin). This is unlike the castrated who is incapable of sexual intercourse and thus unable to ejaculate. Thus if his penis is struck without being cut or its bone being fractured, there is a just evaluation if its value diminishes. However, there is no *diyyah* because the organ has not disappeared, and because there was no benefit in it that disappeared.

**Two testicles (*al-baydhatan*);** For the two (*untha*) there is the *diyyah*, ie the two testicles due to what came in the Prophet (saw)'s letter to

ibn Hazm, "**For the two testicles there is the *diyyah***", and because they are an organ existing dually in the human so *diyyah* is obliged for the two with half *diyyah* for one of them. Their benefit is in their existence, so if they were cut and their benefit disappeared, for the two is the *diyyah*, and likewise one of the two. However, if they were struck and their benefit disappeared, while they remained, for the benefit is the *diyyah* just like any of the organs with benefit.

**The (*askatan*);** They are the flesh enclosing the vulva (of the woman's private parts) at its two sides, the same way lips enclose the mouth. Linguists say the two outer edges (*shafaran*) border the (*askatan*) just as the eye's outer edges of the eyelids represent their eyelashes. However, though linguists designate the name (*askatan*) to the flesh surrounding the vulva and the name *shafaran* (ie two outer edges) to the (*askatan*)'s borders like the eye's outer edges of the eyelids, their position is not the same as eye's eyelids' outer edges. The eye's eyelids' outer edges mean its eyelids (*ajfan*) and its eyelashes (*ahdab*) is the hair on the eyelids ie what is called the eyelashes (*rumsh*). Thus, for the eyelashes there is the *diyyah* and for the eyelids is the *diyyah*, because they are two separate things, each different to the other. However, the (*askatan*) is the meat surrounding the vulva and the (*shafran*) consists of the two edges (*tarf*) so they are a part of the (*askatan*), and not two separate things. Thus the (*askatan*) and (*shafran*) together are one organ and not two organs. So they are one organ existing uniquely in the human, and thus for the (*askatan*) there is the *diyyah*, acting according to what is understood from the *hadith*, because they are an organ existing dually in the human, and in one of them is half *diyyah*. If they are attacked and paralysed, their *diyyah* is obliged just as if they were cut because they are like the two lips (*shafatayn*). There is no difference between their being thick or thin, short or long, of a virgin or *thayyib* (non virgin), small or large, circumcised or not. This is because they are two organs where the *diyyah* is obliged for them. Whatever was mentioned applies to them regarding the remaining organs. There is no difference between the *rutaqaa* (closed ie cannot be penetrated), *qurana* (hitched together) and *saleema* (sound) because (*rutq*) and (*qurn*) is a defect in other

than these two, just like the situation with deafness in relation to the ear.

**The rear end;** For the rear end there is the *diyyah*, so if it is struck and removed, then there is the *diyyah*, because its benefit disappeared with its disappearance. Likewise *diyyah* is due if it were struck but not cut and it remained as it was before while its benefit disappeared such as if it were closed or torn etc, because it is an organ existing uniquely so *diyyah* is obliged for it like the remaining organs.

**Bones (*'idham*);** The bones are not organs of the body, so the a*hadith* that came regarding the organs do not apply upon them. Thus in each of the two collarbones (*tarquwatan*) and the two forearms (*zindan*) is the just evaluation because they are not two organs. Similar to that, there is no *diyyah* for any of the bones of the two shank (*saaq*), the two thighs, the arm, the upper arm (*'udhd*), bones of the back etc; rather there is for them a just evaluation.

**PUNISHMENTS FOR HEAD WOUNDS (*SHIJAJ*)**

The scholars say the *shijaj* (fractured) are in the head, and the wounds (*jirah*) are in the body, and the rule of *shijaj* is different from the rule of the wounds. The *shijaj* are in the face, and are in the head, which are the revealing (*muwadhiha*) where the wound shows the bones (*wadh*) namely its whiteness. Another type of wound in the head and face is called smashing (*hashima*), where the wound exceeds the revealing (*muwadhiha*) and smashes the bone; it is called smashing because it shatters the bone. Another wound in the head and face is called displacing (*munaqqila*). This is the wound that exceeds the smashing (*hashima*) so it shatters the bone and removes it from its position such that it requires moving the bone so as to heal it. Another wound in the head and face is called (*ma'muma*) which is the wound that reaches to the brain's **core** ie to its **skin**, so if the wound reaches its skin, it is it called (*umma*) or (*ma'muma*). The text came with the amount of the *diyyah* for these fractures. Thus for the (*muwadhiha*) there is five camels, due to what came in the Prophet's letter to Amru bin Hazm, "**For the (*muwadhiha*) is five camels**." And

for the (*hashima*) there is the *diyyah* of the (*muwadhiha*) and a just evaluation, because it is a (*muwadhiha*) and more. Since there is no text specifically regarding it, the *diyyah* of the (*muwadhiha*) is taken from the text and an evaluation is **made** for what exceeds, since it is a wound without defined blood money for it. For the (*munaqqila*) there is fifteen camels, due to what Abu Bakr bin Amru bin Hazm narrated from his father from his grandfather from the Prophet (saw) who said, "**For the (*munaqqila*) there is fifteen camels**." And for the (*ma'muma*) there is one third *diyyah*, due to what came in the Prophet (saw)'s letter to Amru bin Hamz, "**For the (*ma'muma*) there is one third *diyyah***." A text came for these *shijaj* specific to the head and face. There is a just evaluation for whatever remains of the *shijaj* ie the remaining head and face wounds, which are not in the text.

**PUNISHMENTS OF WOUNDS (*JIRAH*)**

The wounds (*jarh*) are the ones which are in the body, and their punishment is reprisal (*qawad*) ie retaliation for the intentional only. As for the non-intentional, *diyyah* is obliged for that which there is a text to mention its amount, and a just evaluation for that which there is no text. The text came in the deep wound (*jaifa*) only. It is narrated from Abubakr Muhammad bin Amru bin Hazm from his father from his grandfather that the Prophet (saw) wrote a letter to the people of Yemen, and of what came in it, "**For the deep wound (*jaifa*) there is one third *diyyah***." The (*jaifa*) is the wound reaching the **stomach** (*jawf*). *Al-Qamoos* said, 'The (*jaifa*) is the stab that reaches the (*jawf*) or pierces it' then it explained the (*jawf*) as the stomach. Since for explanation of the *Shari'ah* texts is referred to the linguistic meaning alone if no *Shari'ah* meaning came in the Book and *Sunnah*, And since there is no *Shari'ah* text to explain the (*jaifa*), thus only the linguistic meaning remains. Hence there is no (*jaifa*) except that in the (*jawf*) ie the stomach as '*Al-Qamoos*' defined it. Thus each wound reaching the stomach ie the stomach's interior, even by using a pranks needle(*mughraz*) becomes a (*jaifa*), and nothing else is called (*jaifa*). The wound that reaches the interior

from the back, chest, neck, or hip etc, is not considered a (*jaifa*), nor does the rule of *jaifa* apply to it, because the (*jaifa*) is restricted only to one thing, namely that which reaches the stomach's **cavity** (*jawf*) and nothing else. If he made two (*ajafa*) with a **separation** (*hajiza*) between the two, then upon him there is two thirds of *diyyah*.
Similar to the (*jaifa*) is rupture the young girl via sexual intercourse, so whoever ruptured his wife while she is a young girl, one third *diyyah* is obliged for rupturing her. It has been narrated from Umar bin Al-Khattab (ra) that he decreed one-third *diyyah* in the rupture (*ifdhaa'*) without any known opposition from the *Sahabah*, so this was *ijmaa'*. Similar to the wife is the female partner in *zina*, thus if he committed *zina* with a young girl and ruptured her, one third *diyyah* is obliged upon him and the dowry of her like, because it occurred via an illegal sexual intercourse, nor was there permission in it. Thus he is obliged to guarantee what he ruined like the remaining *offenses*.

These are the *diyyah* for what is less than life for which evaluation came in the *Shari'ah* texts. Their evaluation came only regarding the organs, head wounds (*shijaj*) and some wounds. As for the body's organs, a text came for some but not for others. However, the text came for the body's organs. By **reviewing** the text, we find it ordained the full *diyyah* for the organ existing uniquely in the human, like the tongue, and it ordained half (*diyyah*) for the organ existing dually in the human like the hands. It ordained one-tenth *diyyah* for the finger in the two hands and its tenth in the feet. Thus the value of the organ's *diyyah* is deduced therefrom ie from this review, whether there came a text for it or not. Thus, there came an evidence for the diyyah of all organs.

As for evaluating the *shijaj*'s *diyyah*, there came a text for some but not for others. It did not come for *shijaj* with which the rest of the shijaj are compared as is the situation in the organs' *diyyah*; rather it came for specific *shijaj*, which it named or explained. Hence it does not apply to all the *shijaj*. Thus, the *diyyah* is according to the text for the *shijaj* for which came a text like the *ma'muma* (wound that reaches the brain's core), (*jaifa*) and others. That for which there is no

text, it is not included in those mentioned in the text, because it does not encompass it, nor are they compared with those mentioned in the text due to the absence of the subject of analogy, so nothing remains except a just evaluation (*hukumat*). So, there is evaluation for every *shijaj* not included in the *shijaj* mentioned in the text. As for the wound, for the (*jaifa*) and the young girl's rupture (*fatq*) via sexual intercourse, there is one-third *diyyah* and there is a just evaluation (*hukumah*) in other than these two.

The *hukumah* is that the one assaulted is valued as if he is a slave free of assault on him then he is valued after he recovered from them; then for him is a *diyyah* equivalent to whatever he lost because of the assault. Ibn Al-Mundhir said, "Every person of knowledge from whom we learnt, considers that the meaning of their saying '*hukumah*' is, 'If a person is struck by a wound without known blood-money, what would the value of this **victim** be if he were a slave without being wounded by this wound? If one hundred dinars, it is said: What is his value after being struck by the wound and after his recovery ends? If it is said: Ninety-five dinars, then one half of the tenth of the *diyyah* is obliged upon the offender. If they say ninety (dinars), then a tenth of the *diyyah*. Accordingly, if it exceeds that or decreases from that it is treated likewise. This is so, because the *diyyah* is secured for his whole, so his parts are guaranteed from it.'" The valuation is only after the wound heals, because indemnity (*arsh*) of the decreed wound is only after its healing is settled. Thus, if the assault does not reduce him anything after recovery, then there is nothing against the offender, since the compensation (*hukumah)* is only because of the reduction.

**THE THIRD CATEGORY; DISCRETIONARY PUNISHMENT (*TA'ZEER*)**

*Ta'zeer* linguistically is prevention (*man'*) and in technical terminology it is disciplining (*ta'deeb*) and exemplary punishment (*tankeel*). Its *Shari'ah* definition deduced from the texts that came regarding *ta'zeer* punishments is the legal punishment for a sin without a *hadd* (decreed punishment) or expiation (*kaffara*) in it. The Messenger of Allah (saw) has applied the *ta'zeer* and commanded with it. It is narrated from Anas, "**that the Messenger of Allah (saw) imprisoned for an accusation**." And from Al-Hasan, "**People quarrelled and some were killed among them. The Messenger of Allah (saw) sent regarding them and imprisoned them**." It is narrated from Amru bin Shuaib from his father from his grandfather, "**that the Messenger of Allah (saw) was asked about hanging fruits. He said, 'There is nothing against anyone with need who took to eat by his mouth without taking away with him. Against the one who leaves taking away something with him, there is a fine of its like and punishment. There is cutting against the one who steals anything of that reaching the price of a shield after it is kept in its barn. Against the one who steals less than that, there is a fine double of its like and punishment**.'" It is narrated that he (saw), "**imprisoned a man for an accusation for an hour of the day then freed him (*khalla sabeel*), and that he decreed with striking and imprisonment**." It is also narrated that Umar (ra) decreed with lashing on the one who fabricated a letter to *Bait al-Mal* having placed upon it a seal's that he fabricated in the **style** of the seal of *Bait al-Mal*, then presented it to the custodian of *Bait al-Mal* and took property from it. Accordingly, the *ta'zeer* is proved by the *Sunnah* and the *Sahabah* proceeded thereupon afterwards.

*Ta'zeer* is legislated upon everyone for whom the Law-Giver did not define a decreed punishment. As for that for which the *Shar'* came with a punishment, its perpetrator is punished with the punishment decreed by the Lawgiver. So everything for which the Lawgiver did not decree a punishment is left to the ruler to decree a punishment for it, and the name *ta'zeer* has been designated for this punishment.

From reviewing the offences ie the ugly (*qabeeh*) actions deemed **ugly** by the *Shar'* namely the sins, and the punishments the Law-Giver

decreed, it is clear that the Law-Giver ordained financial punishments for assaults on the body apart from intentional killing whose punishment is killing if the deceased's relative does not pardon. Apart from that, the punishment is financial punishment, except the tooth among the bones and apart from wounds. The punishments for the remaining types of killing are financial punishments. For the *jinaya* against the body and head wounds (*shijaj*), there are financial penalties; similarly, for the bones except for the tooth; for the wounds are bodily punishments and financial punishments. The *Shar'* came with the amount of these financial punishments and decreed a specific amount for them; and it ordained compensation for those it did not ordain a specific amount. Accordingly, *ta'zeer* is not included in assaults on the body, and there is no place for it there. One should not say that assault on the body that results in injuries less than an amputation, fracture, wound, destruction or scratch deserves *ta'zeer* punishment. This is not true, because the *Shar'* came with rules for assault on the body but not for these; so there is no ta'zeer for them, unless it hindered him from action or brought him disgrace.

As for the sins, namely non-performance of the *fard* or performing the *haram*, we find that the Law-Giver has decreed specific punishments for (some of) these sins like theft, highway robbery, apostasy and others which the Law-Giver decreed specific punishments; these are the *hudud*. We find that the Law-Giver did not decree specific punishments except for six things ie the *hudud*; as for the rest, He did not decree specific punishments for them. Thus, the sins for which the shar' did not decree specific punishments, they come under ta'zeer. So *ta'zeer* comes in what is of the category and type of *hudud* for which He did not decree a specific punishment, but not for assault against the body.

The *ta'zeer* punishment is measured by the measure of the offence, so a greater punishment is decreed for a more serious offence, such that the meaning of punishment ie **deterrent** (*zajr*), is realized. A punishment is decreed for the lesser offence, thus restraining the offender from committing its like. It should not be greater than that,

so as not to be an injustice against the sinner. Is the evaluation of the punishment by the competent authority ie *Khaleefah* or judge left for him, so he evaluates it as he deems fit, or is it restricted to that which does not exceed the *hadd*? Some fuqaha mentioned that the *ta'zeer* cannot validly exceed the *hadd*, saying; It is stipulated that the *ta'zeer* does not reach the level of the *hadd* obliged in the sin's category. They use as evidence what was narrated from Abu Barda from the Prophet (saw) who said, "**Whoever reaches a *hadd* in other than a *hadd* is among the transgressors (*mu'tadeen*)**." They also said that the punishment is according to the level of the offence and sin, and the sins explicitly stated regarding the *hudud* are more serious than others; so it is not permitted to reach the greater (punishment) for the lesser of two matters. Malik said, it is permitted that the *ta'zeer* exceeds the *hadd* if the Imam deems fit due to what was narrated that M'an bin Zaida fabricated a seal in the style of the seal of *Bait al-Mal* then produced it to the custodian of *Bait al-Mal* and took property. This reached Umar (ra) who lashed him one hundred and imprisoned him, then he was approached regarding him, so he lashed him another one hundred, then he was approached again, so he lashed him one hundred and exiled him. Ahmad narrated with his chain that a *Najashi* was brought to Ali (ra) who had drank *khamr* (alcohol) in Ramadhan so he lashed him eighty as *hadd* and twenty whips due to his breaking the fast in Ramadhan. Most fuqaha hold that it is invalid for the *ta'zeer* to exceed the level of the *hadd*.

However, close scrutiny shows that the *Shar'* ordained the evaluation of the *ta'zeer* punishment to the *Khaleefah*, *Amir* or *qadi* without restriction, thus referring for it to his *ijtihad* as he deems fit and what the person's situation and offence's reality and its situation in the country**.** Thus, it is left to ijtihad whereas restricting it to a maximum or minimum limit amounts to making it

it a *hadd* thereby negating it being a *ta'zeer* and negating its being left to ijtihad. There are also some offences that are not *hudud* but could be **more horrible** than the *hadd* eg **addiction** (*idman*) to narcotics

(*mukhaddarat*) like hashish and opium is **worse** than drinking *khamr*, stealing a **large** amount from *Bait al-Mal* is **worse** than stealing a property whose price is one quarter dinar from a person and so on. Moreover, there are offences that can lead to fragmenting the *Ummah's* unity such as calling to nationalism or regionalism or the like. Due to this, the correct view is that *ta'zeer* is not measured with a maximum or minimum limit; it is rather left to the *Khaleefah* or *Amir,* then to the *qadi*'s ijtihad.

As for the *hadith*, "**Whoever reaches a *hadd* in other than the *hadd* is among the transgressors**", it is explained that the type of punishment he decreed should not exceed what the *Shar'* decreed as punishment for it. However, the *hadith* does not prevent exceeding that by a punishment from other (types). So whoever reaches up to the *hadd* of *zina* for kissing is among the transgressors ie he would be of the transgressors if he lashed one hundred lashes for it. The *hadith*, however, does not prevent him lashing ninety lashes for it together with imprisoning for three years and one year of exile, as this increase is in other than the *hadd*. For example if a man had sexual relations with his mother, daughter, sister or any one of his *mahrem*, the same as a man does to his wife in kissing, playing fun, taking the position of zina etc, except that he does not have intercourse with her; will the *qadi* not reach the *hadd* of *zina* in punishing this man? Or is he lashed less than the *hadd* of *zina*, while inflicting other punishments upon him, like imprisonment, exile, fine etc? For instance where a person is **addicted** to opium and he has been punished more than once without being deterred from that, would the *qadi* not reach the *hadd* of the drinker of *khamr* in punishing him? Or would he lash him less than drinking while inflicting other punishments upon him, such as branding with fire, imprisonment, exile etc?

The *hadith* prohibits reaching the *hadd* for other than the *hadd*. The *hadd* is a specific punishment for a specific offence. This specific punishment does not exceed the *hadd*. However, if he inflicted something else, this is not included in the prohibition, and thus remains for the *qadi*'s ijtihad.

Thus, the *hadith* means prohibiting the exceeding of the specific punishment, but it does not include inflicting other punishments. Ash-Shawkani said, "Some of the later (scholars) mentioned that the *hadith* refers to disciplining emanating from other than the *walis*, such as the master striking his slave, husband striking his wife and father striking his child." However, the *hadith*'s expression with the word "whoever (*mun*)" by saying, "**Whoever reaches a *hadd***", is of the expressions of generality, and nothing came to specify it to other than the *wali*, therefore this interpretation is not correct. Accordingly, the *hadith*'s interpretation means that whoever reaches a *hadd* in a specific punishment in other than what it was explained for is a transgressor. Whereas, if he inflicts various punishments whose totality does not reach the *hadd*, he is not considered of the transgressors.

In principle, the evaluation of the punishment of *ta'zeer* is left to the *Khaleefah*. However it is permitted that he leaves it to the *qadi*'s ijtihad; and it is also permitted that he prevents the *qadi* from evaluating it, but rather he evaluates it for him. The *qadi* is the *Khaleefah*'s representative, and the judiciary is specified to a time, place and incident. It is permitted to designate him to some issues and absolutely prevent him from decreeing the punishment in *ta'zeer*; or he can prevent him from decreeing some issues while allowing him in others. Whatever the case, the decreed *ta'zeer* does not go beyond from being one of the *Shari'ah* rules ie the action is either a *fard*, *mandoub*, *mubah*, *haram* or *makruh*; it does not go beyond one of these five. However, as the *mubah* is giving the responsible person (*mukallaf*) the option of doing or leaving the action, its doer does not contravene the commands and prohibitions of Allah. Rather, whether in the situation of doing or leaving it, he is following the commands and prohibitions of Allah, and he is choosing what the *Shar'* gave him a choice in. As for the *mandoub* and *makruh*, Allah *Ta'ala* did not ordain a punishment for leaving the *mandoub* nor for doing the *makruh*, because assigning the punishment means compelling the *mandoub*, which means making it *fard* or compelling leaving the *makruh*, which means making it *haram*. It is not permitted for the State to make the *mandoub fard* or the makrouh *haram*, thus it is NOT permitted for the

State to lay down *ta'zeer* punishments for leaving the *mandoub* or doing the *makruh*. Accordingly, the *mubah*, *mandoub* and *makruh* are not included in the subject of punishments.

There remains the subject of leaving the *fard* and doing the *haram*. As for leaving the *fard*, this is because Allah assigned punishment for it, so the one who leaves the prayer, abstains from fasting Ramadhan, zakat, discharging a human being's right and the like; all that is leaving the *fard*, and Allah threatened the one who neglects these *fard*s with punishment. As for doing the *haram*, this is because Allah likewise assigned punishment for it, so the one who defames another in other than *zina*, hoards money, steals, spies and the like, are of those who do *haram*, and Allah has threatened those who do these *haram* actions with punishment. So there is no argument that the ruler can decree *ta'zeer* punishments for these, as they are all **sins** since leaving the *fard* and doing the *haram* are both sins that deserve punishment. All this clarifies that when the *Khaleefah* assigns specific *ta'zeer* punishments, he must restrict himself only to matters for which Allah decreed punishment. It is not correct that he exceeds this. So he must restrict the *ta'zeer* punishment for leaving the *fard* and doing the *haram*, he is not allowed to exceed this whatsoever. As for what came about the *Sahabah* (ra) punishment for the leaving of some *mandoub* actions and for doing some makrouh actions, that is not suitable as evidence, unless it were an *ijmaa'*, and there is no *ijmaa'* narrated regarding that.

Just as it is not permitted to give a *ta'zeer* punishment for doing the *makruh*, or leaving the *mandoub* or *makruh*, likewise it is not permitted to lay down *ta'zeer* punishments on the pretext of looking after the affairs, or in the name of benefit (*maslaha*). This is because looking after the affairs is restricted to what was ordained to the Imam to supervise by his opinion and ijtihad such as planning cities, regulating the balances (*mawazeen*) etc. He has no right in other than that. As for benefit, it is not a *Shari'ah* evidence, thus there is no punishment for it.

**TYPES OF *TA'ZEER* PUNISHMENTS**

The *ta'zeer* is a punishment that is ordained for the *Khaleefah* to evaluate. However, it was not ordained for him to punish with whatever he wishes. Explicit texts prohibited punishment with (specific) punishments, thus it is not allowed to punish with them. Furthermore, the *Shar'* texts of the Qur'an and *Sunnah* came with specific defined punishments and the command came to inflict these punishments. The fact that the *Khaleefah*'s ijtihad regarding the ta'zeer is of its extent and not any punishment he wishes, and that the Law-Giver revealed specific punishments; all of this indicates that inflicting punishment in *ta'zeer* is confined to what the Law-Giver punished with, without allowing them to punish using other methods.

As for the punishments that are explicitly prohibited, they include burning with fire; hence the punishment of burning with fire is not permitted. Al-Bukhari narrated from the *hadith* of Abu Hurayrah, "**Indeed no one punishes with the Fire except Allah.**" It is also narrated from Ikrimah that the Prophet (saw) said: "**Do not punish with the punishment of Allah**", ie burning with fire. It is also narrated from ibn Masoud from the Prophet (saw) that he said, "**It is not fitting that anyone punishes with fire except the Lord of the Fire**." All this is explicit in forbidding the punishment of burning with fire. What is of the category of fire is linked to it such as electricity. As for what came about the Messenger of Allah (saw) in the *hadith* of the people of 'Uraynah that he (saw), "**commanded with (iron) nails so they were heated and he branded them**", this is branding with fire, for which there is no prohibition. The Messenger (saw)'s use of it, by inflicting punishment with it, is an evidence for its permissibility. What is prohibited thereof is only burning with fire. As for the punishments that the Lawgiver ordained to punishment with, they are the following punishments;

**Punishment of Killing;** The *Khaleefah* is permitted to reach the limit of killing in *ta'zeer*. Even though killing is one of the *hudud* namely the *hadd* of the married (*muhsan*) *zani* and the *hadd* of homosexuality, and the *hadith* prohibits reaching the *hadd* in other than the *hadd*, however killing is not a *hadd* possible to reduce its limit like lashing. Rather it is one *hadd* thus the *hadith*, "**Whoever reaches a *hadd* in**

**other than the *hadd***", does not apply to it. However, that *hadith* means the *hadd* of lashing, because it is conceivable in it to reach or not reach the *hadd*. That is not conceivable in killing; likewise cutting the hands and feet. Accordingly, it is permitted that *ta'zeer* reaches the extreme limit until it reaches killing. The evidence for that is the *hadith* of the people of 'Uraynah which, even though it came as evidence for the *hadd* of highway robbers, its reality is that of treachery, killing and apostasy, and not the reality of highway robbery. Qatadah reported from Anas "**that people from 'Ukl and 'Uraynah came to the Prophet (saw) and confessed Islam. They found Madinah not healthy for them, so the Prophet (saw) them cattle and a shepherd. He commanded them to go out and drink of their urine and milk. They departed until when they were in the area of Al-Harra, they apostatised from their Islam, killed the Prophet (saw)'s shepherd and herded the cattle. The Prophet (saw) got news of that, so he sent some people after them. He gave instructions regarding them, so their eyes were driven with nails, their hands were cut, and then they were left in the area of Al-Harra until they died**." This is the reality of the incident of the people of 'Uraynah. Even though it was treachery, killing and apostasy, its reality was **threatening/breaching** the security that combined the three. Thus the Messenger did not punish them with the punishments of treachery, killing and apostasy, but rather made an example of them. He did not kill them, but rather left them in Al-Harra until they died; and before leaving them he branded their eyes with fire and cut their hands. This indicates that the event of **breaching security** is horrible from which it is deduced **that the Imam is permit**ted *to reach* the limit of killing in *ta'zeer*.

Moreover, the *legisla*tive reason (*'illah*) for punishment *is* ***de*terrence** (*zajr),* since it is clea*r in H*is *say*ing *Ta'ala, "***There is life for you in re*taliat*ion**", [TMQ Al-Baqarah:17*9]* and 'that there is *life* in retaliation' is the *'illah* for retaliation, and deterrence is the *'illah* for inflicting *puni*shment. Th*e Musl*im **is not permitted t*o ex*ceed the punishments *st*ipulated by the texts because Allah kno*ws the*y deter and *He* legislated them while knowing that. Whereas, regarding those offences f*or w*hich the Law-Giver did not define a punishment and left

their evaluation to the Imam, it is for the Imam to l*ay down* a deterrent punishment for them and, if he sees it as non-deterrent, it is his du*ty to* lay down a more severe punishment until deterrence is achieved. There are *many* offences for which the Lawgiver did not define specific punishments, and deterrence is not realised in them except by killing; for these offence**s the Imam can ordain killing as punishment. For example the *Shar'* text stipulated, "If two Imams are given the bay'ah, kill the second of them", but it did not stipulate regarding the one who incites people and gathers them to give the bay'ah to the second Imam after the contracting of the (first) Imam's bay'ah. This one is not given the bay'ah as Imam over the people so the *hadith* does not apply upon him. However, his crime might be worse than the crime of pledging a second Imam. Hence, it is allowed for the Imam to make killing as his punishment. For instance no text came from the Lawgiver regarding the one ca**lling to nationalism—whether Arab, Turkish, Iranian or Berber nationalism—and rallies people on nationalism, while fragmenting of the **Islamic State, even f**ragmenting of the Muslims is known to have resulted from this call. So the Imam can ordain killing as the punishment for the one who advocates this call. Likewise for the one who advocates the call for separating a region from the body of the Islamic State which, as understood from his (saw) saying, "**Kill came to you, while your affair is united under one man, intending to divide your unity or divide your *jama'ah***", is not one of the *hudud*. Rather it is *ta'zeer* left *to the* Imam to kill or punish him a punishment less than killing. This is explicit that the Imam is permitted to reach the limit of killing in his punishment and so on. Thus the *Khaleefah* is permitted to reach the limit of killing in the *ta'zeer*.

**1.** **Lashing;** This is striking with the **whip** (*sawt*) and its like. The punishment of striking came in the Qur'an for He *Ta'ala* said, "*Those (wives) from whom you fear disobedience (nushuz) admonish them (then) refuse to share their beds with them (then) beat them*" [TMQ An-Nisa':34]. The punishment of lashing came in the Qur'an, "*Lash both the female and male zani one hundred lashes*" [TMQ :2]. Lashing came with the whip and others. It is narrated from Zayd bin Aslam,

"**that a man confessed to *zina* against himself in the time of Messenger of Allah (saw). So the Messenger of Allah (saw) called for and was brought a broken whip. He said, 'More than this.' Then he was brought a new whip whose *thamarat* (ie edges) were not cut so he said, 'Between these two.' So he was brought a whip that had become soft and had been (*rukiba*) (ie had been used in striking until it became *soft*). He commanded with it and lashed**." This is evidence for punishment with a whip. And Ahmad narrated from Abu Umamah bin Sahl from Said bin Sa'd bin 'Ubadah who said, "**There was within our dwellings a weak prematurely born man. The people of the community were surprised to find him on top of one of their slave girls committing evil with her. So S'ad bin Ubadah mentioned that to the Messenger of Allah (saw) and that man was a Muslim. So he said, 'Lash him his *hadd*.' They said, 'O Messenger of Allah, he is weaker than you think. Were we to lash him one hundred, we would kill him.' So he (saw) said, 'Take for him a bundle of one hundred branches stripped of leaves, then lash him once with it.' He (S'ad) said, 'They did (this)**.'" This is evidence for punishment with other than the whip; the (*'uthkal*) is a cluster of palm-trees (*'unqud*), where many branches with each of these branches being called (*shimrakh*). Accordingly striking with the whip and with other than the whip are legitimate punishments, so the Imam is permitted to punish by striking with the rod, staff, stick (*'asa*) and by the whip.

However *ta'zeer* by striking and lashing is not permitted to exceed ten strikes or ten lashes; that came explicitly in the texts of the *hadith*. Al-Bukhari narrated from Abdurrahman bin Jabir from the one who heard the Prophet (saw) saying, "**No punishment with ten strikes except for one of the *hudud* of Allah**." And Al-Bukhari narrated from Abu Burdah (ra) who said, 'The Prophet (saw) would say, "**No lashing beyond ten lashes except in one of the *hudud* of Allah**."' Another narration of Al-Bukhari said, "**Do not lash beyond ten except for one of the *hudud* of Allah**." Ahmad extracted from Abu Burdah bin Niyah that he heard the Prophet (saw) saying, "**No lashing beyond ten except for one of the *hudud* of Allah**." This indicates that striking beyond ten strikes, or

lashing beyond ten lashes, is not permitted as is the explicit *hadith*. The *Khaleefah* or qadhi is not free in that; rather he is restricted with what came in the *hadith*'s text. This is corroborated by what As-Shalinji narrated with his isnad (transmission) from the Prophet (saw) that he said, "**Whoever reaches the *hadd* in other than the *hadd* is among the transgressors**", which is explained by one of the types of the *hadd* namely lashing, because it is the only one in which it is conceivable to reduce the *hadd*'s maximum; this is inconceivable in killing or cutting. So this *hadith* corroborates the *hadith* of ten (lashes). The Messenger prohibited punishment in *ta'zeer* to reach the level of the *hadd*, which is inconceivable except in lashing. However, it is not limited to a specific number. He defined it by his saying, "**beyond ten (lashes)**." So the *hadith*, "**Whoever reaches a *hadd***", is unrestricted, common in any number less than the *hadd*, and the *hadith*, "**beyond ten (lashes)**", is restricted to a specific number; thus the unrestricted is referred to the restricted, and the two *hadith* are combined. The *hadith*, "**Whoever reaches a *hadd***", is specified to the *hadd* of lashing, because the *hadith*'s meaning is only conceivable in it. Therefore the Imam is not permitted to exceed the punishment of lashing and striking in *ta'zeer* beyond ten (lashes) or strikes.

**2. Imprisonment;** *Shari'ah* imprisonment is hindering the person and preventing him from **disposing himself** whether this was in a country, house, mosque, a prison prepared for punishment etc. The evidence that imprisonment is one of the *Shari'ah* punishments is what was narrated by Bahz bin Hakeem from his father from his grandfather "**that the Prophet (saw) imprisoned a man due to an accusation then released him**." It is narrated from Abu Hurayrah "**that the Prophet (saw) imprisoned a person a day and a night for an accusation**." Imprisonment at the time of the Prophet (saw) was in a house or mosque; this was the case at the time of Abu Bakr (ra); so there was no prison at that time prepared for **litigants**. When it was the time of Umar (ra), he bought a house of Safwan bin Umayyah for four thousand dirhams and made it a prison. Umar (ra) imprisoned Al-Hutai'a for a defamatory poem and imprisoned Sabeegh due to his questioning about '*Adh-Dhariyaat*', '*Al-Mursalaat*', '*An-Nazi'at*'

(names of verses) and their like. It is narrated from Uthman bin Affan (ra) that he imprisoned Dhab'I bin Haris who was of the robbers and annihilators of Bani Tamim, until he died in prison. It is narrated from Ali bin Abu Talib (ra) that he built a prison of reeds and called it *Nafi'a*, then the **robbers** dug it. Then he built a prison from mud, which was called *Mukhees*.

Imprisonment is among the punishments like lashing and cutting so it must be painful and a deterrent for the prisoner. Accordingly, it is wrong to say that we must make the prisons as reform schools since the school is not a prison. The school is for teaching and upbringing, while the prison is for inflicting pain upon the offender, so it must be in a form that it becomes a deterrent punishment. Its construction, rooms and passages must be different from the construction, rooms and passages of schools, homes, **hotels** etc. It should be of a form that **incites** distress and grief. Its rooms should be **quasi-dark** such that their lighting be day or not, without allowing in them bedding or furniture. Rather the prisoner is given rough bedding made of fibres and its like, and a rough cover made of rag or sackcloth or the like; his food is rough and not a large amount, but it must be sufficient to nourish him and leave him enjoying health. No one should be allowed to visit him except his relatives and neighbours, and they should not stay long with him. However it is permitted for his wife to stay overnight with him if the prison director sees that the prisoner's situation requires that, or his morals and behaviour in the prison are good. He is prevented from leaving the prison except for a need assessed by the prison director. He is not struck, chained, fettered or humiliated except if the *qadi*'s decision stipulated that. Whoever showed stubbornness in the prison is placed in isolation in a narrow and tight room, closing the door on him and leaving to him that by which he answers nature's call, together with water and food dropped to him from the door-**hole**. However, transferring the prisoner to this tight room is not according to the prison director's or goalers' opinion; rather it must be by the *qadi*'s decision, because it is a punishment exceeding the decreed punishment, thus it requires the *qadi*'s decision. If the (*aAmir*)??? requires hardening or lightening his

imprisonment, he must raise the matter to the *qadi* who gives the decision he deems fit. The offender is not imprisoned except in his country, since imprisoning in other than his country is considered **expulsion,** which requires a decision from the *qadi* different to the decision of imprisoning, because this is an additional punishment.

Prisons are of different types according to the offences perpetrated, and the type of imprisonment is defined by the *qadi*'s decision. 'Political' and 'non-political' offences do not exist, and there is no distinction between journalists, lawyers and their like from other prisioners; rather each ugly (*qabeeh*) action is considered an offence. The degree of offence, whether minor or serious, is left to the Imam's evaluation, because he is the one who evaluates it. So, whoever defamed or slandered a person is punished for that, irrespective of his being a journalist or not; and whoever defames the rule falsely is punished fir it, irrespective of his being a politician or not. The judge is allowed to change the punishment according to the offender. So a person might be punished with imprisonment for a year and another punished for the same offence with imprisonment for a week. A person might be punished by placing him in a prison of extreme severity, and another is placed in a lighter prison, due to the information he has regarding the two, where one of them is well known to be an offender, while the other is of the pious people and his offence is a stumble that Satan plunged him in, or the like.

The prisoner could either be sentenced or detained. If he is sentenced, there is no **discussion** about it. If detained, he must be placed in a lighter prison, because he is imprisoned for an accusation and not an offence. It is necessary to limit the arresting period to the least possible period. If renewing his arrest is required, that requires a *qadi*'s decision and a reason convincing the *qadi*; if no decision is issued for renewing his arrest, he is released at the end of his arrest without need for a **release** order. If the *qadi* is transferred, deposed or another designated in his place, it is obliged upon the new *qadi* to commence his work by looking into the situation of detainees. Thus, whoever's accusation is proved against him, he is sentenced; and

whoever is acquitted, he is released immediately. No person is imprisoned or detained without a *qadi*'s decision.

There is no limit set by the *Shar'* for imprisonment that cannot be exceeded as in the situation of lashing, since the *Shar'* did not come with a text with a specific limit or period, it rather left its evaluation to the *Khaleefah*. However, since the punishments are deterrents, it is observed in evaluating the imprisonment period for the offence that it is a deterrent for the sinner and others. Thus, the one upon whom *ta'zeer* is obliged, he is punished with what deters him; there is no maximum limit whatsoever in the issue of imprisonment. It has been narrated that he (saw) Sentenced with imprisonment, and it is not narrated that he committed himself with a specific period or designated a specific period; so the rule with respect to imprisonment remains unrestricted because it came unrestricted. As for what some fuqaha say that the extreme limit for imprisonment is a year without being permitted to exceed a year in analogy to expulsion, it is an erroneous view because imprisonment is not compared with exile, for their realities are different. Moreover, there is no unified *'illah* suitable for analogy, that exists in both of them. It is not correct to say that the definition of imprisonment applies upon exile, because imprisonment is hindering the person and preventing him from **disposing of himself**, which applies upon exile, which is likewise hindering the person and preventing him from **disposing of himself,** thus it is one of its individuals. This is not true, because exile is not preventing the person from **disposing of himself**; rather it is preventing him from **disposing of himself** in other than a specified place. The exiled is not held captive in a specific place; rather he is restrained to a specific country or *wilayah,* so it is different to prison. Moreover, exile exceeds the prison in a second aspect, as it is expelling the person from his **land** or the place where he lives to another place; thus it is **banishment,** which does not apply to the definition of imprisonment. Accordingly the period of imprisonment is not limited to a year; rather the *Khaleefah* is permitted to designate the period he deems fit as a deterrent for the sinner and others, and the *qadi* is permitted to judge with the period

he deems deterrent for the sinner, from the period the *Khaleefah* designated.

As for what came regarding imprisoning the rich indebted person for one half month for a little money and for two or more months for a lot of money, based on the amount of money he is imprisoned over; that is not an inevitable evaluation, because it occurred in specific circumstances with specific persons. Hence, it is not correct to be taken as a principle, nor to be implemented upon other incidents. Accordingly, the matter of judging the maximum limit is unrestricted. The *Khaleefah* is permitted to ordain a maximum and minimum period for the specific offence,and he is permitted to define only the maximum limit, if he adopts a specific limit for *ta'zeer*. If he does not adopt a specific limit, the *qadi* can define the period when he pronounces judgement.

The *Khaleefah* is not obliged to define a prison term for every offence, because this is a sort of adoption, and adoption is permitted, and not obliged, upon the *Khaleefah*. However, the *qadi* is obliged to clearly define the jail period which he decrees for a specific person, such that it becomes known, and not left unknown, and such that the judgement becomes defined and not **uncertain**. Thus, he defines it for a specific period, such as so and so years or so and so months or until the occurrence of a specific matter such as the end of Ramadhan, the day of Eid al-Fitr and the like. This definition of the jail period that he decrees for the sinner is obligatory, so that the punishment that the *qadi* inflicts becomes a specified punishment and not an unknown punishment. This is because it is established that the *Shar'* stipulated that the action be defined in the binding contracts. Thus, it is stipulated in the binding contracts of trade and hire that it be known; and it is stipulated in the binding actions, such as prayer and oaths, that they are known. However, the *qadi*'s verdict of punishment is one of the actions, thus it must be defined. However, the judgement of imprisonment is a judge's verdict, and the judge's verdict must be known. It would not be known if the punishment he inflicted was unknown. Therefore, it is necessary for him to mention the period of

imprisonment with which he judged, and to define it with a specific period, whether the judgement is for an offence or an accusation.

Accordingly, it is not permitted to imprison for accusation until there is evidence, because that is undefined; rather a period must be defined within which to collect the evidence. This period is evaluated by the extent required to acquire the evidence according to what is apparent and known, and not what is possible and imagined. So if he says 'until I bring forth my two or more witnesses from such and such country' or 'such and such place', the period required is evaluated and defined within the imprisonment order, on condition that the evidence is not outside the State's authority. This is because where it is outside the State's authority, producing it is uncertain, so the matter reverts to the *qadi*. If he views there is a possibility of producing it, he defines the period he deems fit; if he views the production of evidence doubtful, he defines the least possible period in which it is usually possible to produce the evidence.

Likewise, it is not permitted to judge with imprisonment upon anyone 'until repentance' or 'until death', because this is an unknown judgement thus invalid, since it is unknown when he will repent or die. It is not correct to say that defining imprisonment with death is known, and not unknown, for it is a definite matter which must occur, thus it is definition with something known; this is not correct because the **time period** the sinner is sentenced with in this verdict is not known. The judgement is not with death, but rather with a period that ends with death, and because this is an unknown time period, the resulting verdict regarding it is unknown. It is not correct to say that Allah *Ta'ala* defined imprisonment until death in His Ta'ala saying, "*Confine them until death comes to them*" [TMQ AN-Nisa':15], because this *ayah* was abrogated by the *ayah* of (*Surah*) *An-Nur*, "*Lash both the female and male zani…*" [TMQ An-Nur:2]; thus it is not appropriate to us as evidence. Moreover, the husband's preventing of his wife from going out of his house is not considered imprisonment in the *Shar'*; it is allowed for him to prevent her going out of his house any time he wants. This is not considered imprisonment of her since, were that so, he would be punished because inflicting punishment upon people is

restricted to the ruler (*hakim*). No one else is permitted to punish. It is also because when Allah allowed the husband to disciple his wife, He defined the types of disciplining, namely admonition, separation and non-painful beating, "*Those (wives) from whom you fear disobedience (nushuz) admonish them (then) refuse to share their beds (then) beat them*" [TMQ An-Nisa':34] without mentioning imprisonment as one of them.

thus he is not permitted to imprison her. Accordingly there is no evidence in the *ayah* for permitting the punishment of imprisonment until death. As for what is narrated that the Prophet (saw) said, "**Kill the killer and put into captivity until death the one who holds captive until death**", its meaning is that whoever kills is killed, and whoever kills a person by imprisoning him with an imprisonment that kills, in order to kill him is killed in the same manner by which he killed ie by imprisoning him an imprisonment that kills him, in order to kill him. It does not mean that he is imprisoned until he dies. It is a type by which the killer is killed, and it is a *jinayah* not *ta'zeer*; so there is no indication in it for permitting imprisonment until death. Accordingly, the *Shar'* doest not permit judging with life imprisonment; rather it is imperative to define the imprisonment period with which a specific person is judged.

Imprisonment is **arrest** and not putting to labour, so labour is a thing other than imprisonment. Hence where a person is sentenced with imprisonment, it is not permitted to put him into labour, because the word 'imprisonment does not include employment. However, is it allowed to judge with imprisonment together with labour, or is it restricted to judging with imprisonment? The answer to that is that no *Shar'i* text came to ordain labour as punishment, whether hard labour or normal labour. However, the fuqaha mentioned that when the poor creditor is judged with imprisonment, he is put to labour in some work for a wage to discharge his debt; but this view is an intellectual and not *Shar'i* judgement, thus there is no value in it. Since the types of punishment decreed by the *qadi* are restricted by what the *Shar'* came with, and punishment with hard labour was not mentioned, there is

no punishment with it. Rather, it is restricted to imprisonment by the meaning of **arrest**.

**3. Expulsion/exile (*nafy*);** This is banishment (*taghreeb*) or deportation (*ib'aad*). The punishment of exile came in the Qur'an for He *Ta'ala* said, "*Or they are exiled from the land*" [TMQ Al-Ma'idah:33]. The punishment of exile also came in the *hadith*. Ahmad extracted from Abu Hurayrah, "**that the Prophet (saw) decreed with one year exile and performing of the *hadd* upon the one who committed *zina* without being married (*ihsan*)**." Al-Bukhari narrated from ibn Abbas (ra) who said, "**The Prophet (saw) cursed the effeminate among men and the masculine-like among women and said, 'Expel them, and expel so and so (person).' And Umar expelled so and so**." These evidences prove that exile is a type of punishment that *Shar'* came with just as they prove that punishment by it occurred in *ta'zeer*. The *Sahabah* (ra) proceeded on that, thus Umar (ra) exiled Sabeegh to Basra after lashing him, and likewise Umar (ra) exiled Nasr bin Hajjaj for fear that women would be tempted by him. Uthman (ra) exiled Abu Dharr Al-Ghifari. Exile is banishment and not permanent residence, so it is invalid to elongate its period. No text came to define the maximum limit for the punishment of exile. However, when the *Shar'* inflicted the punishment of exile upon the non-*muhsan zani*, it decreed it for one year. Even if it is not a mandatory *hadd*, since the Imam is permitted to add exile to lashing, the *Shar'* did not ordain it for greater than a year. Even if this does not indicate defining the maximum limit of exile, it is taken into consideration that it be the **norm** (*sunna*). However, nothing prevents exceeding that, on condition that the period of residence is not considered permanent residence, because the meaning of exile, namely banishment, disappears.

Exile is only within the borders of the Islamic State. Exile outside its limits is invalid, because it is expulsion from Dar al-Islam to Dar al-*Kufr*. It is appropriate for the State to choose specific places for exile. They said, "Abu Az-Zinad was the exile place of people to Badhi', of the Ethiopian (*Habashi*) land and that is the furthest coastal plain of Yemen." This is because exile is a punishment, and it is appropriate

that the punishment of exile be painful, such that deterrence occurs. It is narrated from Al-Hasan and Az-Zuhri, regarding exiling highway robbers, that exiling them is expelling them from big cities and lands such that they are not left to settle in any land ie they are not allowed to settle in the land but are rather transferred from one land to another. However, this opinion makes them look as travellers, whereas the closest meaning
to exile as a punishment is that there should be deserted places of exile such that exile to them causes pain, (*yu'allam*) so that exile becomes a **deterrent** punishment.

**5. Ostracism (*hajr*);** This is where the ruler commands people not to speak to a person for a specific period. Its evidence is what occurred with the three (men) who stayed behind when the Messenger (saw) prevented Muslims speaking to them; that was their punishment. Umar (ra) acted similarly when he punished Sabeegh by lashing and exiling him, and he commanded people not to speak to him. However, this punishment is used (only) if it deters ie with people who have sensitivity (*ihsas*) and appreciate the meaning of people ostracising them. As for those people with weak sensitivity, this punishment does not cause them pain, thus it is not used with them.

**6. Crucifixion (*as-salb);*** This occurs in one case only where the offender's punishment is killing, then it is permitted to decree crucifixion as well, due to His saying *Ta'ala*, "*…that they are killed or crucified*" [TMQ 5: ] (MISSING REFERENCE). "Or" (*aw*) is of the meaning of "and" (*wa*) ie they are killed and crucified, or killed without crucifixion. However, crucifixion as the sole punishment is invalid because it is torture. The Prophet (saw) prohibited the torture of animals, so the prohibition of torturing a human being is by greater reason. As for their saying that the Prophet (saw) crucified the person while living, they did not produce its chain, and the *ayah* of crucifixion ordains it after the killing. The *Shari'ah* rule is that it is combined with killing, or there be killing without it; no one said of crucifixion alone regarding the punishment of highway robbers. Thus, crucifying the living person is not one of the punishments; rather crucifixion is for the one killed, so killing and crucifixion is decreed for him. So

crucifixion accompanies the killing, and in this way the punishment of crucifixion takes place.

**7. Fine (*al-gharama*);** This is a judgement upon the sinner to pay money as punishment for his sin, and it is proved by the *Sunnah*. An-Nasaa'i has narrated in a *hadith* from Amru bin Shuaib from his father from his grandfather, "**He said, 'O Messenger of Allah, what is regarding fruits (*thimar*) and what is taken of them while they are in their shells?' (IS SKIN A BETTER WORD?) He (saw) replied, 'whoever takes of them by mouth without taking inside clothing, there is nothing against him. And whoever carries with him, there is regarding it a fine of twice its like and exemplary lashing**.'" An-Nasai added at the end of the *hadith*, "**Whatever does not reach the value of a shield (*majann*), there is a fine of twice its like**." It is narrated that the Prophet (saw) said, "**And the one who hides the lost item, there is upon him its fine together with its like**." Likewise the *ta'zeer* of the withholder of zakat is taking half of his property. All this indicates that the Messenger commanded with the punishment of the fine in *ta'zeer* and for that there is no specific *hadd*, so it is left for the *Khaleefah* to evaluate, or for the *qadi*, if the *Khaleefah* does not adopt regarding it a specific amount. If the sinner is unable to pay the fine, is he imprisoned for its amount or pardoned? The answer for this is that if he is judged with a specific punishment, it is not correct to punish him with another punishment, because the *qadi*'s judgement must be executed as pronounced. Thus he is not imprisoned instead of paying the fine, and likewise he is not pardoned of it because pardon is cancelling the *qadi*'s judgement. What is preferred in such a situation ie a situation of the sinner's inability to pay the fine is to take from the apparent of his property where it exists. If it does not exist, he is granted a respite until he has property, after which the fine is collected by the State.

**8. Destroying (*itlaf*)** of **property;** That is by completely destroying it, such that it cannot be **utilised** just as the Messenger of Allah (saw) did with the idols attached to the Ka'aba, for he commanded regarding them, so they were broken and destroyed. This is also what Muslims did when the *ayah* forbidding *khamr* was revealed; they emptied what

they had of jugs of *khamr*, before smashing the empty vessels. It is also narrated that the Prophet (saw) commanded that *khamr* be spilt and its jugs broken . The *Sahabah* proceeded according to that. It was narrated that Umar (ra) spilt the adulterated milk.

**9. Altering the essence of property;** That is by altering its form or **quality**. It is narrated from the Prophet (saw), "**that he prohibited breaking the currency permitted between Muslims like dirhams and dinars except if there was impairment therein. If that was the case, it was broken",** ie the Messenger prohibited **breaking coins** of gold and silver except if they were counterfeit, and if so, they were broken and crumbled as a punishment, and the counterfeiter was punished. The Messenger (saw) cut the head of the **idol** until it resembled a tree. Thus, if property came in a forbidden form, this property is altered into an acceptable form with no forbidden elements, and the one who produces such property is punished, in a manner deemed fit by the ruler.

**10. True threat;** That is by threatening to punish the sinner if he does such and such. The evidence for that is what was narrated that the Prophet (saw) said, "**Allah bless the man who hung his whip where his family sees it**."

**11. Admonition;** That is by the *Qadi* admonishing the sinner to frighten him of Allah's punishment. The evidence for that is His Ta'ala saying, "*And admonish those whose disobedience (nushuz) you fear*" [TMQ 4: ] (MISSING REFERENCE).

**12. Deprivation (*hirman)*;** That is by sentencing the sinner with deprivation, such as depriving the **disobedient wife** (*nashiz*) of maintenance, deprivation of the **booty** (*salb*) of the **killed person**, and deprivation of his share of the public properties, and so on.

**13. The punishment of reproaching;** This is verbal humiliation of the sinner. Reproaching has been proved by the *Sunnah*, for it is narrated that Abu Dharr exchanged insults with a man so he reviled him regarding his mother. Upon hearing this, the Messenger of Allah (saw) said, "**O Abu Dharr, did you revile him with his mother? You are a man in whom there is ignorance (*jahiliyya*)!**" **Also, a slave complained about Abdurrahaman bin Awf to the Prophet (saw), so**

**Abdurrahman became angry and insulted the slave by saying, 'O son of the black woman.' The Prophet (saw) became very angry, for that and raised his hand saying, 'The son of the white (woman) has not authority (*sultan*) over the son of the black (woman)except by due right (*haqq*).' So Abdurrahman bin Awf became embarrassed and felt submissive, placed his cheek upon the soil then said to the slave, 'Tread upon it until you are pleased.'"** It is narrated that the Prophet (saw) insulted the two men who contravened his prohibition when they drank from the well before his reaching it. All this indicates that reproaching and insult are of the *ta'zeer* punishments; and the *Sahabah* (ra) proceeded upon that. It is narrated that Umar (ra) reproached Ubadah bin As-Samit by saying to him, "O idiot." Accordingly, it is permitted for the *Qadi* to reproach the sinner, which is not considered insult from the *Qadi*; rather it is a punishment the *qadi* inflicts upon the sinner. There are no specific words for reproaching; rather all words that considered of the kind of reproaching can validly be used by the *qadi* and ruler except for words considered of the kind of *qadhf* (slander) which are impermissible to use, for there is a general prohibition against using it, and that includes the rulers as well as others.

**14. The Punishment of Reviling Publicly(*tasheer*);** Public reviling of the one upon whom punishment is inflicted is to remove people's trust in him, and it is publicising the offender's offence to the people, warning them of him and disgracing him **publicly**. The origin of the punishment of public reviling is His Ta'ala saying, "*And let a party of believers witness their punishment*" [TMQ 24:3], (INCORRECT REFERENCE) whose objective is reviling them publicly for in attending their punishment by lashing there is scolding, censure and disgrace. The *Sunnah* came with what indicates of the punishment of public reviling, for Al-Bukhari narrated from Abu Humaid As-Sa'idi who said, "**The Prophet (saw) appointed a man from Bani Asad called ibn Al-Lutbiyya over the sadaqa. When he came, he said, 'This is for you and this has been gifted to me.' The Prophet (saw) stood upon the *minbar*, praised and glorified Allah then said, 'What is wrong with the *'amil* whom we sent then he comes saying, 'This is for you and**

**this is (gifted) to me.' Why does he not sit in his father's and mother's home and see if he is given gifts or not? By the One in whose hand is Muhammad's soul, no one comes with anything (unlawfully) save that he comes with it carrying it upon his neck on the Day of Resurrection, whether it is a grunting camel, mooing cow or bleating sheep.' Then he raised his hands until we saw the hair (OR WHITENESS??) of his armpits (saying), 'Have I conveyed?' thrice**." The way of deducing by this *hadith* is that the Messenger (saw) informed that Allah will punish whoever takes from the public money, and whoever takes a gift because he is a *wali* or *'amil*, by disgracing him on the Day of Resurrection as he will come carrying what he took of property, whether a grunting camel, mooing cow or bleating sheep. This means disgracing him publicly on that Great situation. So public reviling is of what Allah punishes with, and there came no text to specify it as Allah's punishment as it came regarding punishment by fire; thus indicating it is permitted for the ruler to punish the sinner by publicly reviling him. The *Sahabah* acted accordingly, and punished in *ta'zeer* by public reviling. It was transmitted about Umar bin Al-Khattab that he would publicly revile the false witness by touring him around; and it was transmitted from the famous *qadi*s that they would sentence with public reviling. *Qadi* Shuraih would sentence with public reviling, and this Shuraih was a *qadi* at the time of Umar bin Al-Khattab and Ali bin Abu Talib (ra), and he was among the famous *qadi*s.

These are the types of *ta'zeer* punishments for which the *Shar'* brought evidence permitting the ruler to punish with. As for the remaining punishments for which there came no text from the Lawgiver to prohibit, it is not permitted for the ruler to inflict punishments with them. That is because punishment is an action that requires a text to permit it. It is not correct to say that there should be evidence to prevent a specific punishment, because the origin is not to punishment, so inflicting a specific punishment is what requires evidence. **As for the origin being not to punish, that is because the general evidence is established on preserving the dignity of the human and not to inflict harm upon him,** thus inflicting a specific

punishment upon him requires evidence permitting its infliction. So, unless there is an evidence to allow a specific punishment, then it is not allowed to inflict it.

said it is not correct to say that *ta'zeer* has been ordained to the ruler absolutely (*mutlaq*) without restriction, so he can discipline with the punishment he deems fit. This is not true, because what was ordained to the ruler is to **evaluate** the **amount** of punishment, nothing else. The Lawgiver has intervened in punishments by designating their types ie He designated the types of punishments to be punished with so the *qadi* is restricted by these punishments ie the Lawgiver's designation of the punishments types has restricted the *qadi* to them. So, he is not allowed to punish with other punishments, though he may choose from among them what he deems fitting as a **deterrent**. Accordingly, the ruler is obliged, when inflicting the *ta'zeer* punishment, to be restricted to the *Shari'ah* rules so he does not punish except with the punishments that the Lawgiver revealed. Thus, the ruler is not permitted to inflict the punishment of **confiscation,** because there came no *Shari'ah* text to permit punishment with it. It is not correct to say that confiscation is like the fine, because it is a monetary punishment, and hence it is a kind of fine. This is not true because confiscation is different from the fine, since the fine is paying money as requital for a sin, whereas confiscation is taking the very property because of which the sin occurred. So this one is not the same as that. Moreover, the *Shar'* text was not a text for monetary punishment, so as to say, 'This is a monetary punishment included under the *Shar'* text'; rather it is a text regarding the fine, altering property and destroying property. The text did not mention the confiscation, so one has to restrict oneself to the text and there is no analogy with it due to the absence of a suitable legislative reason (*'illa*) for analogy. However, confiscation is the forceful seizure of ownership of wealth and giving its ownership to the State without any *Shari'ah* means of ownership, and this is not permitted.

**INCIDENTS OF *TA'ZEER* AND PUNISHMENTS ADOPTED FOR THEM**

*Ta'zeer* is the punishment for a sin without a *hadd* or expiation (*kaffara*). In other words, it is punishment for sins that the Lawgiver did not decree punishment for. The Lawgiver left evaluation of the punishment for these sins to the *qadi* who looks into the matter of the sin in his capacity as the *Khaleefah*'s representative in judiciary (*qadha*). This means that He left it to the *Khaleefah* and consequently the *qadi*. Hence we find the *fuqaha* have elaborated the rules of punishments, performed ijtihad and wrote numerous opinions in *ta'zeer*, but they limited themselves to general subjects without going into details. This is because it is left to the *qadi* to lay down punishments upon the **incidents referred** to him to settle them; and they are renewed and different; they might even be contradictory. So they (the *fuqaha*) laid down principles for them that might not be a regulator applicable to them.

The reality is that leaving the *ta'zeer* to the *qadi* is more applicable to the **incidents** as they vary according to the circumstances. Shar' helps the *qadi* so as to proceed on the path of *ijtihad* regarding the punishment, and to follow the path of creativity regarding understanding **realities**. Thus, leaving the matter to the *qadi* is the essence of wisdom and rightness. However, this is only when the *qadi*s are ruling by the *Shar'* and have proceeded upon it for a period until they possessed skill and acquired a judicial talent or, at least, a juristic faculty. As for today's *qadi*s at the end of the 14$^{th}$ century *hijri*, the year 1385, and the beginning of the second half of the 20$^{th}$ century CE, 1965, a period of more than half a century has passed over Muslims while they implement the rules of western jurisprudence (*fiqh*), which distanced them from the *Shar'a* rules, and their vision of these rules has weakened in them. This is especially that the *qadi*s hold the seats of judiciary have not practiced the implementation of the *Shar'* rules of punishments. None of them were concerned with their study, except a few, who did so as a theoretical study for information, and not a practical study for canons and rules. Thus, it is not wise to leave the *ta'zeer* completely to these *qadi*s, because it is leaving to non-experts in the *Shar'* punishments, rather to experts in *kufr* laws in relation to punishments. Moreover, the **inclination** of Muslims,

particularly the educated including *qadi*s, has been dominated by the intellectual praising (*tahseen*) and (*taqbeeh*???) that dominated(*tagha*) upon society. It became easy for them to reject the *Shar'*s inclinations, so they came to view the punishment of crucifixion as barbaric, cutting the hands as an inhuman practice and heating nails in fire then branding eyes with them as an uncivilised practice. Thus, it is not right to leave the evaluation of punishments to persons of such **inclinations**. There are also horrendous offences where reality has proven their horror that cannot be **deterred** except by extreme punishments. So, if we leave the matter of these offences to these *qadi*s, who have neither practiced politics **intellectually** in the form of accounting the rulers, nor practically in holding the authority (*sultan*). The judiciary they hold is not an authority, so they could deem excessive to judge with the extreme punishments necessary for producing deterrence occurs. Thus, they could deem excessive to judge the one who carries the call to nationalism with lashing and ten years imprisonment, and the one who establishes a political party on the basis of nationalism with death. Thus, they would inflict a non-**deterring** punishment that becomes an **encouragement** for these extremely horrendous offences. Hence, protecting the *Ummah's* entity requires not leaving these types of punishments to these types of *qadi*s. Accordingly, the *Khaleefah* must adopt specific punishments for specific realities of *ta'zeer* for a period of time until the concepts and inclinations of the majority of Muslims are corrected.

However, when he adopts specific punishments for specific realities of *ta'zeer*, it must be understood that these punishments are not like the punishments of *hudud* and retaliation that do not vary according to the people. Rather, they are punishments that naturally vary according to the people. The *Shar'* has stipulated that they differ according to the people. It is narrated from Aisha (ra) that the Prophet (saw) said, "**Steady the people of dignity from their stumble, except the *hudud***." And he (saw) said about the Ansar, "**Accept from their <u>good-doer</u> (*muhsin*) and overlook their <u>evil-doer</u> (*musi'u*)**." This means that those not known to commit sins, or those known to be committed to **good actions** and piety, are given lesser punishments. From Az-Zuhri

from Qubaysa bin Dhuib that the Prophet (saw) said, "**Whoever drinks *khamr*, lash him. If he repeats, lash him. And if he repeats the third or fourth (time), kill him**." Abu Hurairah narrated that the Prophet (saw) said regarding the thief, "**When he steals, cut off his hand then if he steals, cut off his leg**", which means that those who repeatedly sin—and they are the previously convicted people—are punished severely. This clarifies that it is not correct that the evaluation of the *ta'zeer* punishment be of a specific punishment that neither increases nor decreases; rather it must have a maximum limit not allowed to be exceeded by the judge. The lower (limit) is left to the judge to evaluate according to the persons and sins. So he inflicts the most extreme punishments upon those who offend repeatedly or for severe offences, and he inflicts less than that according to what he deems the persons or offences deserve. Accordingly, evaluation must be spacious for the *qadi*, so only the maximum limit is mentioned. The question then becomes; is the minimum limit also mentioned? The answer is that there is no meaning to this in a general way since the *qadi* may view that, in an offence whose punishment is three years imprisonment, the accused person is of the righteous pious people so his offence was like a horse's stumble, thus reproaching him suffices. Hence, it is better not to mention a minimum limit. However, there are some offences where mercy regarding them is not valid for Allah *Ta'ala* has said regarding the punishment of *zina*, "*Nor should pity for the two seize you in the deen of Allah*" [TMQ 24:3]; but He did not say that in the punishment of theft. Thus, there are offences where mercy regarding them is not valid. So, in case the *qadi* does not know them and mercy might afflict him regarding them, particularly with the righteous pious people, it is better to deliberately restrict the minimum limit in some offences, such that the punishment by itself becomes a **deterrent** to the offender and the people.

Therefore, though it is preferable to adopt specific punishments for specific realities in *ta'zeer*, the details are not adopted ie regarding the issues and branches. Rather, general guidelines are adopted, because the realities change and branch out. Thus, if the adopted were not general guidelines they would not encompass these renewed realities

and branches, hence the adoption would be deficit (*qasir*) and, at that point, the *qadi* would be compelled to lay down the punishment. **Perhaps the danger of being far from laying down the deterrent punishment might occur**. Also, if the adopted realities are not general guidelines, it would distance the *qadi* from ijtihad, because ijtihad is expending effort in understanding the text; whereas the deficit text does not require expending effort in understanding it and implementing it upon the realities. Thus, the adopted punishments must be adopted in general guidelines, and not in issues and branches.

**TYPES OF THE REALITIES OF** *TA'ZEER*

It is difficult to limit the realities of *ta'zeer* in specific types, since the sins are **numerous** and ramified types. Moreover, the change of realities of life makes the offences that occur many; and they are offences not previously known. Hence, the difficulty of limiting the types of *ta'zeer* arises. However, since *ta'zeer* is opposite to the *hudud*, and it predominantly occurs where no punishment was decreed within the type of decreed *hadd*; thus is it better to aim at laying down punishments for the realities for which *hudud* came. Then what can be included in them is included. Otherwise, it is better to leave it to the *qadi*. Thus the realities of *ta'zeer* for which specific punishments are adopted can be summarised in seven types namely:

1. Assaults upon honour (*a'radh*).
2. Assaults upon dignity (*karama*).
3. Actions harming the mind.
4. Assaults upon property.
5. Breaching the peace (*amn*).
6. Threatening State security.
7. Actions that infringe the *Deen*.

**ASSAULTS UPON HONOUR**

It is possible to summarise assaults upon honour as follows:

**Actions incompatible with Modesty**

1. Anyone who attempts *zina* with a female or homosexuality with a male, and some obstacles prevent him from committing the offence, otherwise he would have committed it, is punished with jail up to three years, lashing and exile. If the assaulted victim was under his authority, such as his female or male servant, male or female employee or the like, the most extreme punishment is inflicted upon him. The female or male with whom the attempt occurred is punished the same punishment if they accepted without duress.
2. Anyone who entices a female with money, marriage or otherwise, and lived with her like a husband and wife, did to her all of what a man does with his wife except intercourse, is punished with jail up to four years. Anyone who does that with his *mahrem*, even without enticement, is punished with **imprisonment** up to ten years, lashed and banished. The female is punished the same punishment if she responded to him. Anyone who requests matters contrary to decency (*adab*) from either female or male, offered either of them an action contrary to decency, or addressed them words devoid of modesty is punished with jail from six months to two years. The **one who was approached in that** is punished the same punishment, if he accepted the request.
3. Anyone who embarked on enticing a female or male using deceit, violence or threats, spending money or otherwise is punished with jail up to three years and lashing. The enticed person, whether female or male, is punished the same punishment.
4. Anyone who incites one or more persons, male or female, into debauchery or corruption or assists them in undertaking it is punished with jail up to two years. The person incited is punished the same punishment if they responded to the incitement.
5. Anyone who facilitates either *zina* or homosexuality by any way or style, whether to himself or to another, is punished with jail up to five years and lashing. If the person doing that is a wife or *mahrem*, his punishment is doubled ie up to six years.
6. Anyone who accommodates in his house a stranger to him or her is immediately prevented and imprisoned from six months to a year.

7. If two persons are found in despicable circumstances, **incompatible with** modesty, without intercourse being proven against them, are punished with jail up to four years.

8. Anyone who flirts (*muda'aba*) with a female or male and play with them via drugging or hypnosis, without reaching the level of intercourse is punished up to four years. Anyone who does that to his *mahrem* is punished up to ten years, lashed and banished. If it were without drugging or hypnosis, he is punished up to two years. The person played with is punished the same punishment ie jailed up to two years if he responded to the assaulter.

If a woman dances with an indecent intention in an open area or quasi-open place in a manner devoid of general decency easy for people to see, the one **inducing** the dance and the female dancer, if acting voluntarily, are punished up to three years.

9. Anyone who performs an enticing deed that usually incites l**ust in p**ublic places, such as the road, shops, cafes etc is punished with jail up to six months. If he repeats that, the punishment increases up to two years with lashing.

10. Anyone who has intercourse with a beast or animal is punished with jail up to five years, lashing and banishment.

**ABDUCTION (*khatf*)**

1. Anyone who abducts a person, male or female, by trickery or force and flees to some area, without returning him within three days is punished with jail up to five years if the hostage was a married woman or immature male, whether by their consent or forced upon them. He is punished with jail up to three years if the hostage was mature or she was an unmarried woman. This is if he did not rape or indecently assault them; whereas if he assaults them but it is only proved via a doctor or midwife's testimony rather than by a *Shar'* evidence (*bayyina*), he is punished with jail up to fifteen years, lashing and banishment. If he returns the hostage within three days without injuring them, he is punished with jail up to one year.

Anyone who abducts a female for marriage is punished with jail up to five years, if it were forced upon her. Whereas, if it were by her consent, and they marry with a *Shar'* contract he is punished up to six

months for the offence of abduction. If they do not marry he is jailed up to one year. This is if they do not have intercourse. Whereas if they do, but it is only proven via a doctor or midwife's testimony rather than by a *Shar'a* evidence,he is punished with jail up to fifteen years.

**IMMODEST ACTIONS**

*1.* Anyone who flirts or harasses a female is punished with jail up to a month. If a woman undertakes th*at wi*th a male, she is punished the same punishment together with ten lashes.

*2.* Any man who disguises himself with a woman's dress and enters a place specific to women, or prohibited to enter for other than women at the time of the action, is punished up to six mon*ths.*

*3.* *A*nyone who **p**ublishes, sells or stores with intention of sale, distribution, or offers any **pornographic** material whether printed or drawn, any picture or **tracing** or any other thing that leads (*adda*) to corrupting morals is punished by jail up to six months.

*4.* Anyone who baths within sight of people passing by, contrary to modesty in a public place or a place open to the public with that situation is punished with imprisonment up to six months. Whichever woman baths in a place easy for men to see her is punished the same punishment.

*5.* Anyone who does an action contrary to bashfulness in a public place, public assembly or in a form enabling someone in a public place to see him is punished with imprisonment up to six months.

*6.* Any woman who shows any of her nudity, other than her face and hands, is punished with lashing. If she is not **deterred**, she is punished with imprisonment up to six months.

*7.* Any man who appeared with abnormal dress or form, or immodest or effeminate movements, is lashed. If he is not **deterred**, he is punished with imprisonment up to a year.

*8.* Anyone who spies into a person's house via a hole, door-crack or the like is punished with imprisonment up to six months and lashing. If he spies from the top or bottom of the house, he is punished with lashing.

**ACTIONS RELATED TO MARRIAGE**

1. Anyone who knowingly marries in a way contrary to *Shar',* such as marrying a Zoroastrian (*majusi*) woman, a fifth wife or his irrevocably divorced wife, or a Muslim woman being married by a *kafir* and the like is punished with imprisonment up to ten years. Anyone who knowingly **performs** the marriage contract and is a party or witness to it while aware of that is punished similarly.
2. Anyone who performs a false marriage contract such as marrying his daughter to another falsely, and with deception (*ihtiyal*) is punished with imprisonment up to five years.
3. Anyone who divorces his wife with an irrevocable divorce, and remains associated with her as husband and wife is punished with jail up to five years.
4. Anyone who knowingly marries his temporarily forbidden *mahrem* such as his wife's sister, her paternal and maternal aunt is punished with lashing and jail up to three years.

**ASSAULTS UPON HONOUR/DIGNITY**
**CENSURE, DEFAMATION AND HUMILIATION**

The difference between **censure**, **defamation** and **humiliation** is that censure is ascribing a specific matter to a person, even if subject to doubt and **query** (*istifham*), which usually touches his honour or dignity or exposes him to people's hate or humiliation, whether the action mentioned is a crime/offence or not such as his saying to him, "You are a liar", thus ascribing lies to him or, "Thief", or the like. As for defamation, it is everything that touches a man's honour and dignity without ascribing anything specific to him such as his saying, "You degraded person", "You, base person", or the like. As for humiliation, it is every insulting word, contempt, or every expression, sign, movement or drawing , which usually humiliates. The general guidelines in these three are summarised as follows:

1. Anyone who censures another person by ascribing something specific to him is punished with lashing and imprisonment from a month to two years. However, the defendant is not punished if he proves the matter he ascribed to the person with a *Shar'i* evidence, in analogy to *qadhf* (false accusation).

2. Anyone who defames a person is punished with lashing and jail from a month to two years. The defamer is not asked to justify himself by proving the truth of what he defamed with.

3. Anyone who humiliates a person by any means of humiliation is punished with lashing and imprisonment up to six months.

4. Censure and defamation only oblige punishment where they occur in one of the following forms:

a) Face to face censure and defamation which is stipulated to occur:

i) In an assembly, by facing the assaulted.

ii) In a place where other persons, whether few or many, are able to hear him.

b) Censure and defamation in absence, and its condition is that it takes place in the form of a meeting with persons collectively or individually, even if the one assaulted is absent from the assaulting assembly and from those meeting with them.

c) Written censure and defamation, and its condition is that it occurs:

i) Via what is published and broadcasted to people, or what is distributed to a group of them via writings, drawings, sarcastic pictures or draft drawings ie drawings before they are finished and produced.

ii) Via what is sent to the assaulted of open **letters** and postcards.

d) Published censure and defamation, and its condition is that it occurs:

i) Via the medium of journals, daily or periodic newspapers.

ii) Via any published media such as books, leaflets etc.

5. Humilation only obliges punishment if it occurs in the following ways:

a) If it occurs in a public placed, a place open to public or exposed to onlookers or witnessed by anyone not **involved in the action, but only** due to the perpetrator's error.

Words or chants, whether loudly voiced or transmitted via mechanical media such that it is heard, in both cases, by people who are not involved in the action.

b) Writi**n**gs, drawings, hand-drawn drawings, photographs, films, insignias and paintings, of all types, when presented in a public place, a place allowed to crowds, or exposed to onlookers, sold, offered for sale or distributed to one or more persons.

c) If it occurs in a cable or telephone call, even if it were a mechanical telephone. Likewise if it occurred in an open **letter** (not sealed) or postcard.

6. False rumours that harm individuals, groups or companies, or their reputation, of the kind of censure and defamation. The one who spreads these rumours is punished from a week to two years.

7. Claim against a person that he said a specific statement or did a specific action, where he did not say it or do it, is considered an offence punished by reproach, lashing and imprisonment up to two years.

**ACTIONS HARMING THE MIND**

The general guidelines can be summarized as follows:

**1.** Anyone who **takes** narcotics like hashish, heroin and their like is deemed to have committed and offence and is punished with lashing, jail up to five years, and a fine whose assessment is left to the *qadi*.

**2.** Anyone who sells, buys, presses, transports or stores *khamr* is punished with lashing and jail up to five years. The one whose religion permits him to drink *khamr* is excluded from this.

**3.** Anyone who sells, buys, presses, transports or stores narcotic material is punished with lashing, jail up to fifteen years and is fined twice its value.

**4.** Anyone who sells grapes, raisins or any material used for producing *khamr*, while he knows it is bought to manufacture it, whether selling was directly or indirectly, is punished with lashing and

imprisonment from six months to three years, excluding the one whose religion permits him to drink *khamr*.

**5.** Anyone who opens a place, secretly or openly, to take narcotic material is lashed and jailed up to fifteen years.

**6.** Anyone who opens a place to sell intoxicants, secretly or openly, is punished with lashing and jail upto five years.

**7.** The statement of anyone who claims he sold *khamr* for medical treatment is not accepted, unless his job is to manufacture and sell medicine such as the pharmacist and his like. Whereas, if he proves he sold it for medical treatment, his evidence is listened to.

**ASSAULTS UPON PROPERTY**

**Movable Property**

1. Anyone who steals a theft upon which the conditions of cutting do not apply, such as not removing it from a **safe** (*hirz*) or taking it from a non-**safe**, or where there was doubt like stealing from *Bait al-Mal* and the like, is punished with lashing and jail from a month to fifteen years.

2. Anyone who enters a house to steal, whether or not he stole, in the day or night, and whether he used breaking or dislocation or not, is punished from three month to two years.

3. Anyone who commits robbery, looting or embezzlement (*ikhtilas*) is punished from six months to five years. If he uses violence, his punishment is doubled.

4. Anyone who knowingly buys a stolen, robbed, looted or **embezzled** property is punished with imprisonment from three months upto two years. He must return the property to its owner and guarantee it if destroyed, and he is sentenced to pay its owner its benefit while it was with him, assuming it had benefit. Likewise, anyone who knowingly accommodated a thief, robber or **embezzler** is punished with the same punishment.

5. Anyone who knowingly hides a stolen, robbed, looted, plundered or **embezzled** property intending to preserve it for the criminal or to conceal it etc, is punished with jail from six months upto five years.

Anyone who deliberately destroys another's property or intentionally caused harm to it is lashed and punished with jail upto three years.

6. Anyone who **unjustly seizes by force a property of a**nother person is punished with jail upto two years. If he uses force or threats, his punishment is doubled.

7. Anyone who uses illegally something that relates to someone else in a manner that causes harm to it, without intending to **embezzle** that thing is punished with imprisonment up to six months and a fine left for the *qadi* to assess.

8. Anyone who monopolises a property, whether foodstuff or not, is punished with lashing and imprisonment upto three years and is forced to display the property for sale.

9. Anyone who knowingly owns a property via an invalid contract is punished with lashing and jail upto three months, and the contract is nullified.

10. Anyone who violates any of the *Shari'ah* contracts such as a breach of the **mortgage/pledge** (*rahn*), sale, lease, company etc, is punished with jail upto six months.

11. Anyone who performs a *riba* transaction, or is a party to it, witnesses or writes it, is punished with lashing and imprisonment upto two years.

**REGARDING TRICKERY AND FORMS OF DECEIT**

1. Anyone who induces another person to deliver him a movable or immovable property, or a receipt of guaranteed check or acquittal of a debt, and thus got hold of it by deceit is punished with lashing and jail upto five years, and by a fine that the *qadi* deems appropriate.

Anyone who exploits the need of an immature person, possessed, fool or **insane,** injuriously takes a receipt of loaning hi**m** dirhams, lending him things, conceding to him trading papers or others, a promise(to pay something) or acquittal (of something) is punished with imprisonment from six months to three years.

2. Anyone who fraudulently gives a cheque without funds, or where the **balance** is less than the cheque's value or **withdrawn** all or some of the **balance,** such that the remainder does not cover the

cheque's value, is punished with lashing, imprisonment upto two years and a fine which the *qadi* deems appropriate.

3. Anyone who forges a signature upon financial papers or forged paper money such as receipts, cheques etc is punished with lashing and imprisonment upto two years.

4. Anyone who counterfeits the State's or foreign currency, or knowingly circulates counterfeit currency, is punished with jail upto fifteen years and a fine the *qadi* deems appropriate.

5. Anyone who **induces** others to deliver goods to him with the right of option or deferred payment, while not intending to pay their price, is punished with imprisonment upto a year.

6. Anyone who donates, removes, pledges or facilitated that with the intention of deceiving his creditors, or sells or transfers any portion of his property after a verdict or a decision was issued against him requiring of him to pay an amount of property is punished with imprisonment from six months up to two years.

7. Anyone who conceals from the purchaser or mortgagor an essential receipt related to the ownership of the commodity or the mortgaged property, the mortgage/pledge's right or another mortgage related to it; or **he forges** a testimony upon which the ownership depends or might depend is punished with imprisonment upto a year.

**BETRAYING TRUST IN PROPERTY**

1. Anyone to whom property is handed out via a **trust** (*amana*) or his possession over property was via a trust, and he then **neglects** this financial trust is punished with lashing and imprisonment upto five years.

2. Anyone who betrays their property under his control, such as where he is a **trustee** (*wasiyy*) over orphans, *waqf* trustee, attorney, employee and the like, is punished with lashing and imprisonment upto five years.

3. Anyone who intentionally undertook to hide, squander, **embezzle**, destroy or tear a receipt that contains a promise, acquittal,

any financial papers or receipts is punished with imprisonment upto two years.

**DECEIT (*ghush*) IN TRANSACTIONS**

1. Anyone who uses or acquires volume measures (*makayeel*), balances or measures not approved or recognised by the State, or he made fraudulently while measuring, weighing or metering is punished with imprisonment upto six months.
2. Anyone who deceives another person, whether in the amount or quality of the delivered thing is punished with imprisonment up to a year and a fine that the *qadi* deems appropriate.
3. Anyone who knowingly deceives a contracting party regarding the nature of goods, their essential description, composition or amount of beneficial elements they comprise is punished with imprisonment from a month to two years.
4. Anyone who hinders a tender related to buying, selling or leasing of movable or immovable property

or related to a pledge of contract, supply or **making use of** something etc; is punished with imprisonment upto six months.

5. Anyone who managed through deception to raise or reduce the price of goods is punished with jail from a month to two years.

**BANKRUPTCY**

1. **Fraudulent** bankrupts are punished with jail upto five years.
2. Those who are **accused** of normal and real bankruptcy, and not by trick, if it is proven to be due to negligence or spending money upon the forbidden (things), are punished with jail upto two years.
3. Any debtor who deliberately undertakes to waste creditors' rights via any action that normally wastes their rights such as signing delusive receipts, hiding some of his property or smuggling it etc, is punished with jail upto two years.

**UNJUST APPROPRIATION/SEIZURE (*ghasb*)**

1. Anyone who unjustly seizes a movable or immovable property, whether he uses it or not, is punished with jail upto six months. If he

destroys it, he is fined of its price and the punishment is doubled. If he changes its form, it is looked into; if its value reduces, he is imprisoned for a year and if it does not reduce his punishment is upto six months.

2. Anyone who unjustly seizes an immovable property, land, real estate or gardens is compelled to return it back and punished with jail upto six months. If he introduced in it something that causes harm

to it or to the owner, the punishment is doubled.

3. Anyone who possesses one of the public properties for himself to the exclusion of others is considered an unjust appropriator and is punished with jail upto six months.

**MISCELLANEOUS**

1. Anyone who threatens another person so as to acquire a property is punished with imprisonment upto five years.

2. Anyone who knowingly trades, directly or indirectly, with the enemy is punished with imprisonment upto ten years.

3. Anyone who undertakes manufacturing forbidden things, such as sculpting or painting any living creature is punished with jail upto six months.

4. Anyone who provides false financial reports or hides property, is forced to show them, whether it was a bank, company, trader etc, is punished with jail upto fifteen years and fined upto twice the amount he lied about or hid.

**BREACHING PUBLIC SECURITY**

**Violent Actions**

1. Anyone who unjustly seizes an authority or a State department, or retaining an authority or a State department after being dismissed from it, is punished with jail from two years upto ten years.
2. Anyone who commits any assault targeting civil war or instigating strife (*fitna*) between people is punished with lashing and jail from three years upto twenty years, and the punishment can reach the level of killing and crucifixion.
3. Anyone who commits terrorist acts resulting in disturbing the order, or a situation of public panic and confusion, or hindering people's work is punished with jail from six months upto five years.

**THREATENING STATE SECURITY**

**Writing and Speeches**

1. Anyone who writes or says something that is conducive to cast doubt on the *Shari'ah* rules, or the suitability of the Islamic system, as

a whole or in part, is punished with imprisonment from two years upto fifteen years. The punishment can reach the level of death.

2. Anyone who writes or says something that is conducive to inciting nationalism, regionalism or patriotism is punished from five years upto fifty years. The punishment can reach the level of killing.

3. Anyone who writes or says something that is conducive to shaking the Muslims' confidence in the Islamic State or the Ummah's entity, or incites Muslims against non-Muslims or vice versa is punished with jail from five years up to fifteen years.

4. Anyone who delays the paying of taxes for a month after its due time without a *Shari'ah* excuse is fined double the tax, and the tax is immediately taken from him by force. Anyone who refuses to pay tax is compelled to pay it and is punished with lashing and jail upto fifteen years.

**Party Structures (*takattulaat*)**

1. Anyone who establishes or affiliates to any party structure (*takattul*) based upon separation of religion from State, materialism or any basis other than Islam, is punished with death and crucifixion.

2. Anyone who establishes or affiliates to any party structure based upon patriotism, nationalism or regionalism, even if it takes Islam as a system, is punished with jail upto fifteen years. The punishment can reach the level of killing and crucifixion.

3. Anyone who establishes/ affiliates to any party structure for the sake of changing the rulers or ruling system by force is punished upto fifteen years. The punishment can reach the level of killing.

4. Any secret party structure, whose basis and objective is nothing of the above-mentioned matters, its collaborators are punished with jail upto two years due to its secrecy.

5. Any party structure with relations to any foreign state, its collaborators are punished with jail from two years upto fifteen years.

**Spying**

1. Any foreigner who spies in the country is punished with death.
2. Any *dhimmi* who spies for the advantage of a foreign state is punished with jail from five years up to fifteen years. The punishment can reach the level of killing.
3. Any Muslim who spies for the advantage of a foreign state is punished with jail from five years up to fifteen years.

**Agents**

1. Anyone who works politically for the advantage of a foreign state or states is punished with jail from five years up to fifteen years.

2. Any politician who has personal friendship with rulers of a foreign state, its statesmen, military men or its suspected citizens is punished with jail upto ten years.
3. Any promotion to a foreigner or to seek his assistance, its collaborator is punished with jail upto five years.

**Plots**

1. Anyone who plots with a foreign state to incite it against the State or its rulers, weaken the Islamic State's strength or degrade its status is punished with jail upto fifteen years. The punishment can reach the level of killing.
2. Anyone who undertakes actions or statements in the country that is conducive to incite a foreign state or states against the Islamic State is punished with jail upto five years.
3. Anyone who reveals by writing, speech or talking a State secret that is conducive to harm the State due to its revelation is punished with jail upto fifteen years.

**ACTIONS THAT INFRINGE THE *DEEN***

1. Anyone who performs missionary activity to a *kufr* ideology or *kufr* thoughts is punished with jail from two years up to ten years if he is not a Muslim. If he is a Muslim, the rules regarding the apostate (*murtad*) are applied upon him, ie he is killed. Anyone who undertakes missionary activity to a *kufr deen* among Muslims is punished with the same punishment.
2. Anyone who writes or makes a speech that contains **defamation** of any of the Muslims' creed (*aqeedah*) is punished with jail from five years up to fifteen years if he is not Muslim or the **defamation does not make its speaker a *kafir***. If he is Muslim and the **defamation** makes its speaker a *kafir*, he is punished with the punishment of the apostate.
3. Anyone who advocates *kufr* thoughts to other than the scholars (*ulama*) or promotes *kufr* thoughts, whether they were by book or newspaper or specific thoughts or otherwise is punished with jail up to five years.
4. Anyone who calls to **speculative** (*dhaniyya*) creeds (*aqaid*) or thoughts that are conducive to incite the Muslims' anger is punished with lashing and jail upto five years.
5. Anyone who leaves/abandons the prayer is punished with jail up to five years. Anyone who prays at times and leaves the prayer at other times is punished with jail up to two years.
6. Anyone who breaks the fast in a day of Ramadhan without a *Shari'ah* excuse is punished with jail for two months for each day he broke his fast. If he breaks the fast openly (thereby) violating the

sanctity of Ramadhan, he is punished with jail up to six months for the violation on top of the punishment of breaking the fast.

7. Anyone who delays the payment of *zakat* beyond its due time while able to pay, the double of the *zakat* is collected from him by force, and he is punished with jail upto six months. If he refuses to pay the *zakat*, he is punished with jail up to fifteen years and the double of the *zakat* is collected from him by force.

**OTHER TYPES OF** *TA'ZEER*

Punishments to preserve life and prevent *munkar* are among the types of *ta'zeer*. Examples of these are:

1. Anyone who sees a person, or requested to save a person exposed to the risk of death, while it is within his ability to save that person without exposing himself or others to risk, yet does not act to save him is punished with lashing and jail from three months upto seven years—whether the person is exposed to risk because of drowning like the one swimming in water, illness like the one in need of a doctor, thirst like the thirsty in the desert or place without water, burning, destruction etc or any reason—in case the failure to act to save him results in the person's death. Whereas if the person exposed to danger does not die, the negligent in saving is punished with lashing and a fine that the *qadi* deems fit.
2. Anyone who is able to prevent the offence of killing without exposing himself or others to risk, but does not act to prevent that offence from taking place is punished with lashing and imprisonment upto three years.
3. Anyone who sees someone openly commits a *munkar* in a public place while he is able to restrain him from committing the *munkar* without exposing himself or others to danger, yet does not **adequately** restrain him to prevent him from committing the *munkar*

or to leave the *munkar* is punished with lashing and imprisonment upto six months.

**REMAINING TYPES OF *TA'ZEER***

These are some of the incidents of *ta'zeer* and some of their types. As for the remaining incidents and types, they are left to the *qadi*. For instance, gambling in all its forms of games and lottery is of the most **horrible** offences, thus the *qadi* is not **far** from the right (*sawab*) when he assesses their punishments. Bribery is of the **worst** matters that affect the State's institutions and confidence in it, thus it is not possible for a Muslim *qadi* to have mercy for its perpetrators. Enslaving the free man, obstructing people's **freedom** and similar ugly actions that induce people's anger against those who commit them; thus there is no need for the *qadi* to be told to be harsh in punishing the criminals who commit them. This is the case with the remaining incidents and types of *ta'zeer*; thus they are left to the *qadi*. However, leaving the matter of ta'zeer to the case of the qadi is necessitated by the nature of life and the relationships, together with their charge and veracity. Moreover, it is extremely difficult to enumerate the incidents and types. Hence leaving the matter of in *ta'zeer* to the qadi is an unavoidable matter. Thus, the aforementioned incidents and types that correspond to the *hudud* are sufficient, and the rest are left to the *qadi* to assess the appropriate punishment.

**THE FOURTH CATEGORY**

***Al-Mukhaalafaat* <u>(Violations)</u>**

*Mukhaalafaat* is disobedience to what the State issues of commands and prohibitions. It is known that the *Khaleefah* does not make the *halal haram*, nor the *haram halal*; so he does not oblige the *mubah* or forbid the *makruh*. Likewise, he does not allow or oblige the *haram*, nor forbid the *wajib*, *mandoub* or *mubah*. Rather, he only looks after the affairs of the Ummah and discharges the people's interests, so he discharges them according to the *Shar'* rules. However, the Law-Giver (*Ash-Shari'*) ordained to him to discharge many of the affairs according

to his opinion and *ijtihad* such as his management of *Bait al-Mal* which is delegated to his opinion and *ijtihad*; preparing the army is also ordained to him according to his opinion and *ijtihad*, appointing the *wali's*, administering people's interests, building the cities, opening roads, protecting the people from each other, and protecting public rights etc. These matters and their like are left to the *Khaleefah* to issue commands he deems fit ie enact mandatory canons. Executing these commands ie these canons is *fard* upon Muslims and contravening them is a sin (*ma'siya*). Thus, whatever is not executed of what the people are compelled with, or people contravening what they are prohibited from, is considered a *mukhaalafa* violation ie a punishable offence. These offences are called *violations* and the punishments **designated** for them are also called *mukhaalafaat* offences).

Just as the Law-Giver ordained to the *Khaleefah* the right to command and prohibit people and made their disobedience to him a sin, He as well ordained to him the right to punish people for these *mukhaalafaat* and the right to assess the punishment he deems fit for these *mukhaalafaat*. They resemble the *ta'zeer* in respect to their being without decreed punishments stipulated by the Law-Giver, and in respect to their being left to the *Khaleefah* and *qadi*, in his capacity as the *Khaleefah*'s representative. However, they differ from *ta'zeer* in respect to their being a punishment for abstaining from doing an action the (authority) *sultan* commanded with or doing something the *sultan* prohibited; whereas *ta'zeer* is abstaining from doing an action commanded by Allah or doing an action Allah prohibited.

*Mukhaalafaat* do not require a plaintiff; so the *qadi* has the right of judgement regarding the *mukhaalafa* as soon as he knows about it in any place, without needing a judicial sitting (*majlis*). Rather, he judges the *mukhaalafa* once assured of its occurrence. Umar bin Al-Khattab would punish for the *mukhaalafaat*; he struck a man because he stood in the middle of the road preventing passers by, and he would punish anyone contravening his commands.

**Types of *Mukhaalafaat***

The *mukhaalafaat* are not confined to types, since any violation to the State's canons is considered a *mukhaalafa*. The *Khaleefah* decrees the punishments he deems fit for the *mukhaalafaat* that occur. For instance, he designates a specific distance and limit for the town's squares and public roads, and prevents people from building or planting at their sides up to so many metres, and he punishes anyone violating anything of that with a fine, lashing or imprisonment etc. Also he can designate specific, volume measures, weights and measures to manage business and trade affairs, and he punishes whoever violates his commands regarding this matter. He can also ordain specific regulations for the cafes, restaurants and play grounds and other public places, so as to regulate them, and he punishes anyone who violates these regulations, and so on.

It is possible to assess specific punishments for specific incidents in general guidelines just as in the *ta'zeer*. However, today's realities may change to different realities, and some of them could change radically. Thus, decreeing specific punishments for **prevalent** realities could be imprecise or alien to the right. Therefore, the decreed punishments for the **prevalent** realities remain as they are once agreed upon, but if the punishments were changed by new laws and new commands and prohibitions, then new decrees/assessments are ordained in accordance with new laws.

**Pardon**

Once the offence occurred and is **referred** to the *qadi*, and he has not yet issued a verdict regarding it, it is examined while before the *qadi*; is the perpetrator punished or not? Is the punishment upon him cancelled or not? Can he be pardoned or not? The details are as follows;

With regard to punishing the perpetrator of the offence (*jareema*), all the *hudud*, *jinaayaat* and *mukhaalafaat* punishments are implemented upon everyone under the State's authority (*sultan*) as long as the offence or one of the elements that constitute it or produce it occurs in the lands, air, seas or river over which the State has authority. They are applied on all who bear Islamic citizenship including the *Khaleefah*, rulers and members of the Ummah Council.

This is because there is no immunity for anyone who bears citizenship, whether he did it in the country or abroad.. There is no punishment upon a foreigner who commits an offence outside the State's authority; whereas everyone who bears Islamic citizenship and commits an offence is punished whether he committed it within the State's authority or outside it. The *mu'ahad* (covenanted) and *mu'staman* (under security) are punished if they commit an offence within the State's authority. Diplomatic missions such as ambassadors and envoys are exempted for they have immunity.

However, these punishments are only implemented over the one whom the *Shar'* holds accountable (*mukallaf*) ie if he is mature, sane and acted voluntarily. The child or insane person are not punished due to the Messenger of Allah (saw)'s saying, "**The pen is lifted from three; The sleeping person until he awakes, the child until he becomes mature and the insane until he recovers**." This is explicit in the non-punishment of the child and insane. It is not valid to place immature children in special jails, which they call "Juvenile Reformatories" (*islahiyat al-ahkadh*) because this has no evidence and it contradicts the *hadith*'s text. The *hadith* says, "**The pen is lifted**", meaning he is not punished. If he commits an offence, his responsible guardian is accounted about it. If his offence resulted from his guardian's negligence, the latter is punished; if not, then there is no punishment. As for the child, he is never punished whatsoever. The same applies to the insane, for they are equal due to the *hadith*'s text. Similar to that is the one who is involuntarily intoxicated, he is not punished as his rule is the rule of the insane.

As for the person under in duress (*mukrah*), he is examined. If he is compelled with a compelling duress (*ikrah mulji'a*) by being threatened with a confirmed threat of death if he does not commit the deed, then likewise he is not punished due to the Messenger of Allah (saw)'s saying, "**Lifted from my Ummah is forgetfulness, forgetfulness and what they are compelled to do**." The recognised duress is only the compelling duress; whereas his being put under duress (by the threat) of dismissal from his post, imprisonment or other than that, is

not considered duress that prevents punishment, since the only duress that prevents punishment is the compelling duress and nothing else.
With respect to quashing the punishment from him, the punishment is quashed if he committed the offence in defence his *deen*, life, property or honour. This is because defence is a *Shari'ah* **justification** for committing an offence even if it were the offence of killing, due to the Messenger of Allah (saw)'s saying, "**Anyone killed in defence of his *deen* is a martyr (*shaheed*), anyone killed in defence of his blood is a martyr and anyone killed in defence of his family he is a martyr**." This *hadith* indicates that there is no punishment for the one who defends his *deen*, life, property or honour. If he is killed in defence of that, he is a martyr, and if he kills there is no sin upon him, by the evidence of the Messenger's saying in another *hadith*, "**If you are killed then (you are) in Paradise, and if you kill then (he is) in the Fire**." It is also due to his saying to the man asking him, "'**O Messenger of Allah, what if somebody intends to take my property?' He (saw) replied, 'Do not give him your property.' The man said, 'What if he fought me?' He (saw) replied, 'Fight him**.'" This is a command to him to fight in defence of his property; thus this defence is considered an excuse to commit an offence. Thus the punishment is quashed from him, if it were proved that he committed the offence in defence of his *deen*, life, property or honour.

With respect to pardon, it varies according to the type of the action. If the offence were of the *hudud*, there is **no dispute** that pardon is not allowed whatsoever, due to the numerous a*hadith* that came about that. Ibn Majah narrated from Abu Hurairah that the Prophet (saw) said, "**A *hadd* implemented in the earth is better than it raining for forty days**." Abu Dawud narrated from ibn Umar that the Prophet (saw) said, "**Anyone whose intercession prevented the application of a *hadd* of Allah is an opponent of Allah in His affair**." Muslim narrated from Safwan bin Ummay who said, "**I was sleeping in the mosque on a garment of mine which was then stolen. We seized the thief and referred him to the Messenger of Allah (saw) who commanded his hand to be cut. I said, 'O Messenger of Allah, for a garment whose**

**price is thirty dirhams? I have gifted it to him.' He (saw) replied, 'Why did you not do this before you brought him to me?'"**, and in Ahmad and An-Nasaa'i's narration, "**So the Messenger of Allah (saw) cut him**." Malik narrated in Al-Muwatta from Rabi'ah bin Abdurrahman, **"that Az-Zubair bin Al-Awwam met a person who had caught a thief intending to take him to the *sultan*. Az-Zubair interceded with him to release him but he said, 'No, until I deliver him to the *sultan*.'**

Az-Zubair said, **'Once you have delivered him to the *sultan*, Allah cursed the intercessor and the one being interceded for.'"** These a*hadith* are explicit in indicating the absolute non-permissibility of pardon in the *hadd*, whether by the *Khaleefah* or the right's owner, after the case reaches the ruler.

As in the case of the *jinaayaat*, the human being can pardon his right before and after it's the incident is referred to the *qadi* due to what Ahmad narrated from Shuraih Al-Khuza'iyy who said, "I heard the Messenger of Allah (saw) saying, '**Anyone afflicted with blood or (*khabal*)—and (*khabal*) is the wound—has a choice between one of three; Either he retaliates, takes blood money, or pardons**.'" This is explicit in permitting the human being to pardon his right. And Muslim narrated from Abu Hurairah that the Prophet (saw) said, "**No person pardons a complaint (*madhlama*) except that Allah increases him in dignity ('*izza*)**." At-Tirmidhi narrated from Abu Ad-Darda who said, "I heard the Messenger of Allah (saw) saying, '**No man is afflicted in something of his body then gives charity with it except that Allah raises him a rank and relieves (*hatt*) a sin from him because of it**.'" Pardon in the *jinaayaat* also came in the Qur'an. He *Ta'ala* said, "*O you who believe, retaliation has been prescribed for you in killing. The free man for the free man, slave for slave and female for female. But if the relatives of the killed forgive their brother, then the relatives should demand blood-money in a reasonable manner, and the killer must pay with kindness and gratitude*" [TMQ Al-Baqarah:178]. He *Ta'ala* said, "*The recompense of an evil is a similar evil. And whoever pardons and reconciles, his reward is due upon Allah*" [TMQ Ash-

Shura:40]. These evidences indicate that the human being can pardon his right in the *jinaayaat*, because its subject is the *jinaayaat*, thus it was specific to the subject in which it came. So, it is valid for the right's owner to pardon in cases of *jinayaat*.

Regarding the State in the matter of *jinaayaat*, if the right's owner pardons the punishment it is cancelled and there remains no **scope** for punishment. However if the right's owner does not pardon, it is not allowed for the State to pardon. Thus the *qadi* and *Khaleefah* cannot pardon due to His saying *Ta'ala*, "*There is life for you in retaliation*" [TMQ Al-Baqarah:179] ie the existence of retaliation preserves life, and its absence, by itself, **result**s in the absence of other than life. Retaliation here is the punishment and life is the legislative reason (*'illa*), which revolves with the reasoned rule in existence and absence. Since the State's preserving of life is *fard*, pardon results in leaving the *fard*, which is forbidden. Allah (swt) also explicitly forbade the ruler from pardoning the *hudud*, because it is the right of Allah; likewise the State does not have the right to cancel the right of Allah in the *jinaayaat* nor pardon it. Thus, the ruler is not permitted to pardon it; rather he is obliged to inflict the punishment that the Law-Giver decreed, because of the right of Allah.

As for the *ta'zeer*, decreeing its punishment is left to the *Khaleefah* or *qadi* in his capacity as the *Khaleefah*'s representative. As for the *Khaleefah*, he can reduce the punishment or he may pardon, as it is not *fard* upon him to inflict the punishment. The evidence for that is what Ahmad narrated from Muadh bin Jabal (ra) who said, "**A man came to the Prophet (saw) and said, 'O Messenger of Allah, what do you say about a man who met a woman and knew here. The man did everything a man does with his woman except having intercourse with her.' So Allah revealed the *ayah*, 'And *establish prayer at the two ends (tarfay) of the day and in some part (zulfa) of the night*' [TMQ Hud:114]. So the Prophet (saw) said to him, 'Perform *wudu* and pray.'**" This man committed a *haram* and confessed before the Prophet (saw) who, despite that, did not punish him. Rather he was content of him by saying in one narration, "**Perform *wudu* and pray**",

and in another narration, "**Did you pray with us? He said, 'Yes' so he recited to him, 'Verily the good deeds remove the evil deeds' [TMQ Hud:114]**." The Messenger (saw) did not also punish the one who said to him, "This distribution does not seek the pleasure (*wajh*) of Allah." Likewise he did not

punish the one who said to him regarding the judgement he decreed for Az-Zubair, "**Just because he is your paternal aunt's son?**", despite the Messenger's anger with him. This is evidence that the ruler can pardon the offender when a case of *ta'zeer* is referred to him.

He is also allowed to reduce their punishment and make it the minimum limit. It is narrated from Aisha (ra) that the Prophet (saw) said, "**Overlook the stumbles of the people of honour except for the *hudud*.**" It means to help him stand up **from his fall/stumble,** meaning either by pardoning him or reducing it for him. It is narrated from Anas bin Malik that the Messenger of Allah said, "**The Ansar are my belly and bag. People will increase and they will decrease, so accept from them their good-doer and overlook (*tajawaz*) their evil-doer**." The (*tajawuz*) of the evil-doer is by forgiving him, as the (*tajawuz*) is forgiveness (*safh*). However, this is only for the *Khaleefah*. As for the *qadi*, it is looked into. If the *Khaleefah* defined the minimum limit of the punishment for him, he is not allowed to forgive since he is not permitted to punish with less than the minimum limit the *Khaleefah* defined for him. If he did not define for him a minimum limit, he can pardon like the *Khaleefah*, and he can reduce the punishment. The *mukhaalafaat* are like the *ta'zeer* with respect to pardon, and what applied in *ta'zeer* regarding the subject of pardon applies to them without difference.

All this is regarding the offence once referred to the *qadi* without his judging over it. Whereas, if he had judged over it, pardon is not permitted, except in the *jinaayaat* where the right's owner pardons. As for the non-permissibility of pardon after judgement, it is clear in

the *hudud*, because there is no pardon in the *hadd* which is general whether before or after judgement. As for the *jinaayaat* where the right's owner has not pardoned, this is because it is a right of Allah like the *hudood* without difference of being before or after judgement. With respect to the *ta'zeer*, and *mukhaalafaat*, this is because once the *qadi*'s judgement has been reached, it is mandatory upon all Muslims, thus it is not allowed to abolish, abrogate, change or reduce it or anything else whatsoever, as long as the judgement is within the limits of *Shar'*. This is because once the *qadi* pronounces it, it can never be abolished. The pardon is negation of the judgement, thus it is invalid. As for excluding the *jinaayaat* if the right's owner pardons, this is because the texts that came regarding that are general. Allah *Ta'ala* said, "*Whoever pardons and reconciles*" [TMQ Ash-Shura:40], and he (as) said, "**No man pardons a complaint**", which is general encompassing what is before and after judgement, thus it is excluded by an explicit text. Apart from that, there is absolutely no pardon after judgement whatsoever.